UNITED STATES REPORTS

VOLUME 543

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2004

BEGINNING OF TERM

OCTOBER 4, 2004, THROUGH MARCH 1, 2005

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATA

542 U. S. 505, n. 5, line 3: "15" should be "482–483".
541 U. S. 988, line 25: Substitute "Greene" for "Green".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

JOHN D. ASHCROFT, ATTORNEY GENERAL.[1]
ALBERTO R. GONZALES, ATTORNEY GENERAL.[2]
PAUL D. CLEMENT, ACTING SOLICITOR GENERAL.[3]
WILLIAM K. SUTER, CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
JUDITH A. GASKELL, LIBRARIAN.

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[1] Attorney General Ashcroft resigned effective February 3, 2005.

[2] The Honorable Alberto R. Gonzales, of Texas, was nominated by President Bush on November 10, 2004, to be Attorney General; the nomination was confirmed by the Senate on February 3, 2005; he was commissioned and took the oath of office on the same date.

[3] Acting Solicitor General Clement was presented to the Court on October 4, 2004. See *post*, p. v.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 30, 1994, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

September 30, 1994.

(For next previous allotment, and modification, see 509 U. S., p. VI, and 512 U. S., p. V.)

PRESENTATION OF THE ACTING SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 4, 2004

Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

THE CHIEF JUSTICE said:

The Court now recognizes the Attorney General of the United States, John D. Ashcroft.

The Attorney General said:

MR. CHIEF JUSTICE, and may it please the Court. I have the honor to present to the Court the Acting Solicitor General, Paul D. Clement of Virginia.

THE CHIEF JUSTICE said:

Mr. Solicitor General, the Court welcomes you to the performance of the important office that you have assumed, to represent the government of the United States before this Court. We wish you well in your office.

The Acting Solicitor General said:

Thank you, MR. CHIEF JUSTICE.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2004

LEOCAL *v.* ASHCROFT, ATTORNEY GENERAL, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03–583. Argued October 12, 2004—Decided November 9, 2004

Petitioner, a lawful permanent resident of the United States, pleaded guilty to two counts of driving under the influence of alcohol (DUI) and causing serious bodily injury in an accident, in violation of Florida law. While he was serving his prison sentence, the Immigration and Naturalization Service initiated removal proceedings pursuant to § 237(a) of the Immigration and Nationality Act (INA), which permits deportation of an alien convicted of "an aggravated felony." INA § 101(a)(43)(F) defines "aggravated felony" to include, *inter alia*, "a crime of violence [as defined in 18 U. S. C. § 16] for which the term of imprisonment [is] at least one year." Title 18 U. S. C. § 16(a), in turn, defines "crime of violence" as "an offense that has as an element the use . . . of physical force against the person or property of another," and § 16(b) defines it as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." An Immigration Judge and the Board of Immigration Appeals ordered petitioner's deportation, and the Eleventh Circuit dismissed his petition for review, relying on its precedent that a conviction under Florida's DUI statute is a crime of violence under 18 U. S. C. § 16.

Held: State DUI offenses such as Florida's, which either do not have a *mens rea* component or require only a showing of negligence in the

operation of a vehicle, are not crimes of violence under 18 U. S. C. § 16. Pp. 6–13.

(a) Section 16 requires this Court to look to the elements and nature of the offense of conviction in determining whether petitioner's conviction falls within its ambit. Florida's DUI statute, like similar statutes in many States, requires proof of causation but not of any mental state; and some other States appear to require only proof that a person acted negligently in operating the vehicle. This Court's analysis begins with § 16's language. See *Bailey* v. *United States*, 516 U. S. 137, 144. Particularly when interpreting a statute featuring as elastic a word as "use," the Court construes language in its context and in light of the terms surrounding it. See *Smith* v. *United States*, 508 U. S. 223, 229. Section 16(a)'s critical aspect is that a crime of violence involves the "use . . . of physical force against" another's person or property. That requires active employment. See *Bailey*, *supra*, at 145. While one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another by accident. When interpreting a statute, words must be given their "ordinary or natural" meaning, *Smith*, *supra*, at 228, and § 16(a)'s key phrase most naturally suggests a higher degree of intent than negligent or merely accidental conduct. Petitioner's DUI offense therefore is not a crime of violence under § 16(a). Pp. 6–10.

(b) Nor is it a crime of violence under § 16(b), which sweeps more broadly than § 16(a), but does not thereby encompass all negligent conduct, such as negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The classic example is burglary, which, by nature, involves a substantial risk that the burglar will use force against a victim in completing the crime. Thus, § 16(b) contains the same formulation found to be determinative in § 16(a): the use of physical force against another's person or property. Accordingly, § 16(b)'s language must be given an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense. Pp. 10–11.

(c) The ordinary meaning of the term "crime of violence," which is what this Court is ultimately determining, combined with § 16's emphasis on the use of physical force against another (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses. This construction is reinforced by INA § 101(h), which includes as alternative definitions of "serious criminal offense" a "crime of violence, as defined in [§ 16]," § 101(h)(2), and a DUI-causing-injury offense, § 101(h)(3). Interpreting § 16 to include DUI offenses would leave

§ 101(h)(3) practically void of significance, in contravention of the rule that effect should be given to every word of a statute whenever possible, see *Duncan* v. *Walker*, 533 U. S. 167, 174. Pp. 11–12.

(d) This case does not present the question whether an offense requiring proof of the *reckless* use of force against another's person or property qualifies as a crime of violence under § 16. P. 13.

Reversed and remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

J. Sedwick Sollers III argued the cause for petitioner. With him on the briefs were *Patricia L. Maher* and *Michael J. Ciatti.*

Dan Himmelfarb argued the cause for respondents. With him on the brief were *Acting Solicitor General Clement, Assistant Attorney General Keisler, Deputy Solicitors General Dreeben* and *Kneedler, Donald E. Keener,* and *Greg D. Mack.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Josue Leocal, a Haitian citizen who is a lawful permanent resident of the United States, was convicted in 2000 of driving under the influence of alcohol (DUI) and causing serious bodily injury, in violation of Florida law. See Fla. Stat. § 316.193(3)(c)(2) (2003). Classifying this conviction as a "crime of violence" under 18 U. S. C. § 16, and therefore an "aggravated felony" under the Immigration and Nationality Act (INA), an Immigration Judge and the Board of Immigration Appeals (BIA) ordered that petitioner be deported pursuant to § 237(a) of the INA. The Court of Ap-

*Briefs of *amici curiae* urging reversal were filed for Citizens and Immigrants for Equal Justice et al. by *Carmine D. Boccuzzi, Jr.;* for the Midwest Immigrant & Human Rights Center by *Shashank S. Upadhye;* and for the National Association of Criminal Defense Lawyers et al. by *Paul A. Engelmayer, Douglas F. Curtis, Joshua L. Dratel, Lucas Guttentag, Steven R. Shapiro, Robin L. Goldfaden, Lory Diana Rosenberg, Jeanne A. Butterfield, Marianne Yang,* and *Manuel D. Vargas.*

peals for the Eleventh Circuit agreed, dismissing petitioner's petition for review. We disagree and hold that petitioner's DUI conviction is not a crime of violence under 18 U. S. C. § 16.

Petitioner immigrated to the United States in 1980 and became a lawful permanent resident in 1987. In January 2000, he was charged with two counts of DUI causing serious bodily injury under Fla. Stat. § 316.193(3)(c)(2), after he caused an accident resulting in injury to two people. He pleaded guilty to both counts and was sentenced to 2½ years in prison.

In November 2000, while he was serving his sentence, the Immigration and Naturalization Service (INS) initiated removal proceedings against him pursuant to § 237(a) of the INA. Under that provision, "[a]ny alien who is convicted of an aggravated felony . . . is deportable" and may be removed upon an order of the Attorney General. 66 Stat. 201, 8 U. S. C. § 1227(a)(2)(A)(iii). Section 101(a)(43) of the INA defines "aggravated felony" to include, *inter alia*, "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year."[1] 8 U. S. C. § 1101(a)(43)(F) (footnote omitted). Title 18 U. S. C. § 16, in turn, defines the term "crime of violence" to mean:

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[1] Congress first made commission of an aggravated felony grounds for an alien's removal in 1988, and it defined the term to include offenses such as murder, drug trafficking crimes, and firearm trafficking offenses. See Anti-Drug Abuse Act of 1988, §§ 7342, 7344, 102 Stat. 4469, 4470. Since then, Congress has frequently amended the definition of aggravated felony, broadening the scope of offenses which render an alien deportable. See, *e. g.*, Antiterrorism and Effective Death Penalty Act of 1996, § 440(e), 110 Stat. 1277 (adding a number of offenses to § 101(a)(43) of the INA); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 321, 110 Stat. 3009–627 (same). The inclusion of any "crime of violence" as an aggravated felony came in 1990. See Immigration Act of 1990, § 501, 104 Stat. 5048.

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Here, the INS claimed that petitioner's DUI conviction was a "crime of violence" under § 16, and therefore an "aggravated felony" under the INA.

In October 2001, an Immigration Judge found petitioner removable, relying upon the Eleventh Circuit's decision in *Le* v. *United States Attorney General*, 196 F. 3d 1352 (1999) *(per curiam)*, which held that a conviction under the Florida DUI statute qualified as a crime of violence. The BIA affirmed.[2] Petitioner completed his sentence and was removed to Haiti in November 2002. In June 2003, the Court of Appeals for the Eleventh Circuit dismissed petitioner's petition for review, relying on its previous ruling in *Le*, *supra*.[3] App. to

[2] When petitioner first appealed, the BIA's position was that a violation of DUI statutes similar to Florida's counted as a crime of violence under 18 U. S. C. § 16. See, *e. g.*, *Matter of Puente-Salazar*, 22 I. & N. Dec. 1006, 1012–1013 (BIA 1999) (en banc). Before petitioner received a decision from his appeal (due to a clerical error not relevant here), the BIA in another case reversed its position from *Puente-Salazar* and held that DUI offenses that do not have a *mens rea* of at least recklessness are not crimes of violence within the meaning of § 16. See *Matter of Ramos*, 23 I. & N. Dec. 336, 346 (BIA 2002) (en banc). However, because the BIA held in *Ramos* that it would "follow the law of the circuit in those circuits that have addressed the question whether driving under the influence is a crime of violence," *id.*, at 346–347, and because it found the Eleventh Circuit's ruling in *Le* controlling, it affirmed the Immigration Judge's removal order. See App. to Pet. for Cert. 1a–4a.

[3] Pursuant to the IIRIRA, the Eleventh Circuit was without jurisdiction to review the BIA's removal order in this case if petitioner was "removable by reason of having committed" certain criminal offenses, including those covered as an "aggravated felony." See 8 U. S. C. § 1252(a)(2)(C). Because the Eleventh Circuit held that petitioner's conviction was such an

Pet. for Cert. 5a–7a. We granted certiorari, 540 U. S. 1176 (2004), to resolve a conflict among the Courts of Appeals on the question whether state DUI offenses similar to the one in Florida, which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, qualify as a crime of violence. Compare *Le*, *supra*, at 1354; and *Omar* v. *INS*, 298 F. 3d 710, 715–718 (CA8 2002), with *United States* v. *Trinidad-Aquino*, 259 F. 3d 1140, 1145–1146 (CA9 2001); *Dalton* v. *Ashcroft*, 257 F. 3d 200, 205–206 (CA2 2001); *Bazan-Reyes* v. *INS*, 256 F. 3d 600, 609–611 (CA7 2001); and *United States* v. *Chapa-Garza*, 243 F. 3d 921, 926–927 (CA5), amended, 262 F. 3d 479 (CA5 2001) *(per curiam)*; see also *Ursu* v. *INS*, 20 Fed. Appx. 702 (CA9 2001) (following *Trinidad-Aquino*, *supra*, and ruling that a violation of the Florida DUI statute at issue here and in *Le* does not count as a "crime of violence"). We now reverse the Eleventh Circuit.

* * *

Title 18 U. S. C. § 16 was enacted as part of the Comprehensive Crime Control Act of 1984, which broadly reformed the federal criminal code in such areas as sentencing, bail, and drug enforcement, and which added a variety of new violent and nonviolent offenses. § 1001(a), 98 Stat. 2136. Congress employed the term "crime of violence" in numerous places in the Act, such as for defining the elements of particular offenses, see, *e. g.*, 18 U. S. C. § 1959 (prohibiting threats to commit crimes of violence in aid of racketeering activity), or for directing when a hearing is required before a charged individual can be released on bail, see § 3142(f) (requiring a pretrial detention hearing for those alleged to have committed a crime of violence). Congress therefore provided in § 16 a general definition of the term "crime of violence" to be used throughout the Act. See § 1001(a),

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offense, it concluded that it had no jurisdiction to consider the removal order.

98 Stat. 2136. Section 16 has since been incorporated into a variety of statutory provisions, both criminal and noncriminal.[4]

Here, pursuant to § 237(a) of the INA, the Court of Appeals applied § 16 to find that petitioner's DUI conviction rendered him deportable. In determining whether petitioner's conviction falls within the ambit of § 16, the statute directs our focus to the "offense" of conviction. See § 16(a) (defining a crime of violence as "*an offense* that has *as an element* the use . . . of physical force against the person or property of another" (emphasis added)); § 16(b) (defining the term as "*any other offense* that is a felony and that, *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (emphasis added)). This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.

Florida Stat. § 316.193(3)(c)(2) makes it a third-degree felony for a person to operate a vehicle while under the influence and, "by reason of such operation, caus[e] . . . [s]erious bodily injury to another." The Florida statute, while it requires proof of causation of injury, does not require proof of any particular mental state. See *State* v. *Hubbard*, 751 So. 2d 552, 562–564 (Fla. 1999) (holding, in the context of a DUI manslaughter conviction under § 316.193, that the stat-

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[4] For instance, a number of statutes criminalize conduct that has as an element the commission of a crime of violence under § 16. See, *e. g.*, 18 U. S. C. § 842(p) (prohibiting the distribution of information relating to explosives, destructive devices, and weapons of mass destruction in relation to a crime of violence). Other statutory provisions make classification of an offense as a crime of violence consequential for purposes of, *inter alia*, extradition and restitution. See §§ 3181(b), 3663A(c). And the term "crime of violence" under § 16 has been incorporated into a number of noncriminal enactments. See, *e. g.*, 8 U. S. C. § 1227(a)(2)(A)(iii) (rendering an alien deportable for committing a crime of violence, as petitioner is charged here).

ute does not contain a *mens rea* requirement). Many States have enacted similar statutes, criminalizing DUI causing serious bodily injury or death without requiring proof of any mental state,[5] or, in some States, appearing to require only proof that the person acted negligently in operating the vehicle.[6] The question here is whether § 16 can be interpreted to include such offenses.

Our analysis begins with the language of the statute. See *Bailey* v. *United States*, 516 U. S. 137, 144 (1995). The plain text of § 16(a) states that an offense, to qualify as a crime of violence, must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." We do not deal here with an *at-*

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[5] See, *e. g.*, Ala. Code § 13A–6–20(a)(5) (West 1994); Colo. Rev. Stat. § 18–3–205(1)(b)(I) (Lexis 2003); Conn. Gen. Stat. § 53a–60d(a) (2003); Ga. Code Ann. § 40–6–394 (Lexis 2004); Idaho Code § 18–8006(1) (Lexis 2004); Ill. Comp. Stat. Ann., ch. 625, § 5/11–501(d)(1)(C) (West 2002); Ind. Code § 9–30–5–4 (1993); Iowa Code § 707.6A(4) (2003); Ky. Rev. Stat. Ann. §§ 189A.010(1) and (11)(c) (Lexis Supp. 2004); Me. Rev. Stat. Ann., Tit. 29–A, § 2411(1–A)(D)(1) (West Supp. 2003); Mich. Comp. Laws Ann. § 257.625(5) (West Supp. 2004); Neb. Rev. Stat. § 60–6,198(1) (2002 Cum. Supp.); N. H. Rev. Stat. Ann. §§ 265:82–a(I)(b) and (II)(b) (West 2004); N. J. Stat. Ann. § 2C:12–1(c) (West Supp. 2003); N. M. Stat. Ann. §§ 66–8–101(B) and (C) (2004); N. D. Cent. Code § 39–09–01.1 (Lexis 1997); Ohio Rev. Code Ann. § 2903.08(A)(1)(a) (Lexis 2003); Okla. Stat. Ann., Tit. 47, § 11–904(B)(1) (West 2001); 75 Pa. Cons. Stat. § 3804(b) (Supp. 2003); R. I. Gen. Laws § 31–27–2.6(a) (Lexis 2002); Tex. Penal Code Ann. § 49.07(a)(1) (West 2003); Vt. Stat. Ann., Tit. 23, § 1210(f) (Lexis Supp. 2004); Wash. Rev. Code § 46.61.522(1)(b) (1994); Wis. Stat. § 940.25(1) (1999–2000); Wyo. Stat. § 31–5–233(h) (Lexis 2003).

[6] See, *e. g.*, Cal. Veh. Code Ann. § 23153 (West 2000); Del. Code Ann., Tit. 11, §§ 628(2), 629 (Lexis 1995); La. Stat. Ann. §§ 14:39.1(A), 14:39.2(A) (West 1997 and Supp. 2004); Md. Crim. Law Code Ann. §§ 3–211(c) and (d) (Lexis 2004); Miss. Code Ann. § 63–11–30(5) (Lexis 2004); Mo. Ann. Stat. § 565.060.1(4) (West 2000); Mont. Code Ann. § 45–5–205(1) (2003); Nev. Rev. Stat. § 484.3795(1) (2003); S. C. Code Ann. § 56–5–2945(A)(1) (2003); S. D. Codified Laws § 22–16–42 (West Supp. 2003); Utah Code Ann. §§ 41–6–44(3)(a)(ii)(A) and (3)(b) (Lexis Supp. 2004); W. Va. Code § 17C–5–2(c) (Lexis 2004).

tempted or *threatened* use of force. Petitioner contends that his conviction did not require the "use" of force against another person because the most common employment of the word "use" connotes the *intentional* availment of force, which is not required under the Florida DUI statute. The Government counters that the "use" of force does not incorporate any *mens rea* component, and that petitioner's DUI conviction necessarily includes the use of force. To support its position, the Government dissects the meaning of the word "use," employing dictionaries, legislation, and our own case law in contending that a use of force may be negligent or even inadvertent.

Whether or not the word "use" alone supplies a *mens rea* element, the parties' primary focus on that word is too narrow. Particularly when interpreting a statute that features as elastic a word as "use," we construe language in its context and in light of the terms surrounding it. See *Smith* v. *United States*, 508 U. S. 223, 229 (1993); *Bailey*, *supra*, at 143. The critical aspect of § 16(a) is that a crime of violence is one involving the "use . . . of physical force *against the person or property of another*." (Emphasis added.) As we said in a similar context in *Bailey*, "use" requires active employment. 516 U. S., at 145. While one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would "use . . . physical force against" another when pushing him; however, we would not ordinarily say a person "use[s] . . . physical force against" another by stumbling and falling into him. When interpreting a statute, we must give words their "ordinary or natural" meaning. *Smith*, *supra*, at 228. The key phrase in § 16(a)—the "use . . . of physical force against the person or property of another"—most naturally suggests a higher degree of intent than negligent or merely accidental conduct. See *United States* v. *Trinidad-Aquino*, 259 F. 3d, at 1145; *Bazan-Reyes* v. *INS*, 256 F. 3d, at 609.

Petitioner's DUI offense therefore is not a crime of violence under § 16(a).

Neither is petitioner's DUI conviction a crime of violence under § 16(b). Section 16(b) sweeps more broadly than § 16(a), defining a crime of violence as including "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." But § 16(b) does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in § 16 relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime.[7] The classic example is burglary. A burglary would be covered under § 16(b) *not* because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.

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[7] Thus, § 16(b) plainly does not encompass all offenses which create a "substantial risk" that injury will result from a person's conduct. The "substantial risk" in § 16(b) relates to the use of force, not to the possible effect of a person's conduct. Compare § 16(b) (requiring a "substantial risk that physical force against the person or property of another may be used") with United States Sentencing Commission, Guidelines Manual § 4B1.2(a)(2) (Nov. 2003) (in the context of a career-offender sentencing enhancement, defining "crime of violence" as meaning, *inter alia*, "conduct that presents a serious potential risk of physical injury to another"). The risk that an accident may occur when an individual drives while intoxicated is simply not the same thing as the risk that the individual may "use" physical force against another in committing the DUI offense. See, *e. g.*, *United States* v. *Lucio-Lucio*, 347 F. 3d 1202, 1205–1207 (CA10 2003); *Bazan-Reyes* v. *INS*, 256 F. 3d 600, 609–610 (CA7 2001).

Thus, while § 16(b) is broader than § 16(a) in the sense that physical force need not actually be applied, it contains the same formulation we found to be determinative in § 16(a): the use of physical force against the person or property of another. Accordingly, we must give the language in § 16(b) an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense. This is particularly true in light of § 16(b)'s requirement that the "substantial risk" be a risk of using physical force against another person "in the course of committing the offense." In no "ordinary or natural" sense can it be said that a person risks having to "use" physical force against another person in the course of operating a vehicle while intoxicated and causing injury.

In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term "crime of violence." The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses. Cf. *United States* v. *Doe*, 960 F. 2d 221, 225 (CA1 1992) (Breyer, C. J.) (observing that the term "violent felony" in 18 U. S. C. § 924(e) (2000 ed. and Supp. II) "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence"). Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the "violent" crimes Congress sought to distinguish for heightened punishment and other crimes. See *United States* v. *Lucio-Lucio*, 347 F. 3d 1202, 1205–1206 (CA10 2003).

Section 16 therefore cannot be read to include petitioner's conviction for DUI causing serious bodily injury under Florida law.[8] This construction is reinforced by Congress' use

[8] Even if § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute,

of the term "crime of violence" in § 101(h) of the INA, which was enacted in 1990. See Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, § 131, 104 Stat. 31 (hereinafter FRAA). Section 212(a)(2)(E) of the INA renders inadmissible any alien who has previously exercised diplomatic immunity from criminal jurisdiction in the United States after committing a "serious criminal offense." 8 U. S. C. § 1182(a)(2)(E). Section 101(h) defines the term "serious criminal offense" to mean:

> "(1) any felony;
>
> "(2) any crime of violence, as defined in section 16 of title 18; *or*
>
> "(3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another." 8 U. S. C. § 1101(h) (emphasis added).

Congress' separate listing of the DUI-causing-injury offense from the definition of "crime of violence" in § 16 is revealing. Interpreting § 16 to include DUI offenses, as the Government urges, would leave § 101(h)(3) practically devoid of significance. As we must give effect to every word of a statute wherever possible, see *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001), the distinct provision for these offenses under § 101(h) bolsters our conclusion that § 16 does not itself encompass DUI offenses.[9]

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and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies. Cf. *United States* v. *Thompson/Center Arms Co.*, 504 U. S. 505, 517–518 (1992) (plurality opinion) (applying the rule of lenity to a tax statute, in a civil setting, because the statute had criminal applications and thus had to be interpreted consistently with its criminal applications).

[9] This point carries significant weight in the particular context of this case. Congress incorporated § 16 as an aggravated felony under § 101(a)(43)(F) of the INA in 1990. See Immigration Act of 1990, § 501, 104 Stat. 5048 (Nov. 29, 1990). Congress enacted § 101(h), with its incor-

This case does not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against the person or property of another qualifies as a crime of violence under 18 U. S. C. § 16. DUI statutes such as Florida's do not require any mental state with respect to the use of force against another person, thus reaching individuals who were negligent or less. Drunk driving is a nationwide problem, as evidenced by the efforts of legislatures to prohibit such conduct and impose appropriate penalties. But this fact does not warrant our shoehorning it into statutory sections where it does not fit. The judgment of the United States Court of Appeals for the Eleventh Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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poration of § 16 *and* a separate provision covering DUI-causing-injury offenses, just nine months earlier. See FRAA, § 131, 104 Stat. 31 (Feb. 16, 1990). That Congress distinguished between a crime of violence and DUI-causing-injury offenses (and included both) in § 101(h), but did not do so shortly thereafter in making only a crime of violence an aggravated felony under § 101(a)(43)(F), strongly supports our construction of § 16.

Syllabus

NORFOLK SOUTHERN RAILWAY CO. *v.* JAMES N. KIRBY, PTY LTD., DBA KIRBY ENGINEERING, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02–1028. Argued October 6, 2004—Decided November 9, 2004

Respondent James N. Kirby, Pty Ltd., an Australian manufacturer, hired International Cargo Control (ICC) to arrange for delivery of machinery from Australia to Huntsville, Ala., by "through" (*i. e.*, end-to-end) transportation. The bill of lading (essentially, a contract) that ICC issued to Kirby (ICC bill) designated Savannah, Ga., as the discharge port and Huntsville as the ultimate destination, and set ICC's liability limitation lower than the cargo's true value, using the default liability rule in the Carriage of Goods by Sea Act (COGSA) ($500 per package) for the sea leg and a higher amount for the land leg. The bill also contained what is known as a "Himalaya Clause," which extends liability limitations to downstream parties, including, here, "any servant, agent or other person (including any independent contractor)." Kirby separately insured the cargo for its true value with co-respondent, Allianz Australia Insurance Ltd. When ICC hired a German shipping company (hereinafter Hamburg Süd) to transport the containers, Hamburg Süd issued its own bill of lading to ICC (Hamburg Süd bill), designating Savannah as the discharge port and Huntsville as the ultimate destination. That bill also adopted COGSA's default rule, extended it to any land damages, and extended it in a Himalaya Clause to "all agents . . . (including inland) carriers . . . and all independent contractors." Hamburg Süd hired petitioner Norfolk Southern Railway (Norfolk) to transport the machinery from Savannah to Huntsville. The train derailed, causing an alleged $1.5 million in damages. Allianz reimbursed Kirby for the loss and then joined Kirby in suing Norfolk in a Georgia Federal District Court, asserting diversity jurisdiction and alleging tort and contract claims. Norfolk responded that, among other things, Kirby's potential recovery could not exceed the liability limitations in the two bills of lading. The District Court granted Norfolk partial summary judgment, limiting Norfolk's liability to $500 per container, and certified the decision for interlocutory review. In reversing, the Eleventh Circuit held that Norfolk could not claim protection under the ICC bill's Himalaya Clause because it had not been in privity with ICC when that bill was issued and because linguistic specificity was required to extend the clause's benefits to an inland carrier. It also held that Kirby was not bound by

the Hamburg Süd bill's liability limitation because ICC was not acting as Kirby's agent when it received that bill.

Held:

1. Federal law governs the interpretation of the ICC and Hamburg Süd bills. Pp. 22–29.

(a) When a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation. *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 735. Applying *Kossick*'s two-step analysis, federal law governs this dispute. Pp. 22–23.

(b) The bills at issue are maritime contracts. This Court has recognized that "[t]he boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw." 365 U. S., at 735. To ascertain a contract's maritime nature, this Court looks not to whether a ship or vessel was involved in the dispute, or to the place of the contract's formation or performance, but to "the nature and character of the contract." *North Pacific S. S. Co.* v. *Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U. S. 119, 125. Here, the bills are maritime contracts because their primary objective is to accomplish the transportation of goods by sea from Australia to the United States' eastern coast. Under a conceptual rather than spatial approach, the fact that the bills call for the journey's final leg to be by land does not alter the contracts' essentially maritime nature. The "'fundamental interest giving rise to maritime jurisdiction is "the protection of maritime *commerce.*"'" *Exxon Corp.* v. *Central Gulf Lines, Inc.*, 500 U. S. 603, 608 (emphasis added). The conceptual approach vindicates that interest by focusing the Court's inquiry on whether the principal objective of a contract is maritime commerce. While it may once have seemed natural to think that only contracts embodying commercial obligations between the "tackles" (*i. e.*, from port to port) have maritime objectives, the shore is now an artificial place to draw a line. Maritime commerce has evolved along with the nature of transportation and is often inseparable from some land-based obligations. The international transportation industry has moved into a new era, in which cargo owners can contract for transportation across oceans and to inland destinations in a single transaction. The popularity of an efficient choice, to assimilate land legs into international ocean bills of lading, should not render bills for ocean carriage nonmaritime contracts. Lower court cases that appear to have depended solely on geography in fashioning a rule for identifying maritime contracts are inconsistent with the conceptual approach required by this Court's precedent. Pp. 23–27.

Syllabus

(c) The case is not inherently local. A maritime contract's interpretation may so implicate local interests as to beckon interpretation by state law. See *Kossick*, 365 U. S., at 735. Though some state interests are surely implicated in this case, those interests cannot be accommodated without defeating a federal interest; thus, federal law governs. See *id.*, at 739. The touchstone here is a concern for the uniform meaning of maritime contracts. Applying state law to cases such as this one would undermine the uniformity of general maritime law. The same liability limitation in a single bill of lading for international intermodal transportation often applies both to sea and to land, as is true of the Hamburg Süd bill. Likewise, a single Himalaya Clause can cover both sea and land carriers downstream, as in the ICC bill. Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning. In protecting the uniformity of federal maritime law, this Court also reinforces the liability regime Congress established in COGSA. Pp. 27–29.

2. Norfolk is entitled to the protection of the liability limitations in both bills of lading. Pp. 30–36.

(a) The ICC bill's broadly written Himalaya Clause limits Norfolk's liability. This simple question of contract interpretation turns on whether the Eleventh Circuit correctly applied *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297. Deriving a principle of narrow construction from *Herd*, the Court of Appeals concluded that the language of the ICC bill's Himalaya Clause is too vague to clearly include Norfolk. Moreover, it interpreted *Herd* to require privity between the carrier and the party seeking shelter under a Himalaya Clause. Nothing in *Herd* requires such linguistic specificity or privity rules. It simply says that contracts for carriage of goods by sea must be construed like any other contracts: by their terms and consistent with the intent of the parties. The Eleventh Circuit's ruling is not true to the contract language or the parties' intent. The plain language of the Himalaya Clause indicates an intent to extend the liability limitation broadly and corresponds to the fact that various modes of transportation would be involved in performing the contract. Since Huntsville is some 366 miles inland from the discharge port, the parties must have anticipated using a land carrier's services for the contract's performance. Because it is clear that a railroad was an intended beneficiary of the ICC bill's broadly written clause, Norfolk's liability is limited by the clause's terms. Pp. 30–32.

(b) Norfolk also enjoys the benefits of the Hamburg Süd bill's liability limitation. The question arising from this bill requires the Court to

set an efficient default rule for certain shipping contracts. To interpret the bill, the Court draws a rule from the common carriage decision of *Great Northern R. Co.* v. *O'Connor*, 232 U. S. 508: When an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed. The intermediary is not the cargo owner's agent in every sense, but it can negotiate reliable and enforceable liability limitations with carriers it engages. Respondents' contention that traditional agency law rather than the *Great Northern* rule should govern here is rejected. It is of no moment that the traditional indicia of agency did not exist between Kirby and ICC, for the *Great Northern* principle only requires treating ICC as Kirby's agent for a *single, limited* purpose: when ICC contracts with subsequent carriers for liability limitations. Nor will a decision binding Kirby to the Hamburg Süd bill's liability limitation be disastrous for the international shipping industry. First, a limited agency rule tracks industry practices. Second, if liability limitations negotiated with cargo owners were reliable while those negotiated with intermediaries were not, carriers would likely want to charge the latter higher rates, resulting in discrimination in common carriage. Finally, this decision produces an equitable result, since Kirby retains the right to sue ICC, the carrier, for any loss exceeding the liability limitation to which they agreed. See *id.*, at 515. Pp. 32–35.

300 F. 3d 1300, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Carter G. Phillips argued the cause for petitioner. With him on the briefs were *Stephen B. Kinnaird, Amanda L. Tyler, Hyman Hillenbrand, Richard K. Hines V,* and *Taylor Tapley Daly.*

Deputy Solicitor General Hungar argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Solicitor General Olson, Assistant Attorney General Keisler, Malcolm L. Stewart, Jeffrey A. Rosen, Paul M. Geier, Dale C. Andrews, Peter S. Smith, Robert B. Ostrom, Amy Larson, Phillip Christopher Hughey, Ellen D. Hanson,* and *Alice C. Saylor.*

David C. Frederick argued the cause for respondents. With him on the brief were *Michael F. Sturley, J. S. Scott Busby,* and *Charles Robert Sharp.**

JUSTICE O'CONNOR delivered the opinion of the Court.

This is a maritime case about a train wreck. A shipment of machinery from Australia was destined for Huntsville, Alabama. The intercontinental journey was uneventful, and the machinery reached the United States unharmed. But the train carrying the machinery on its final, inland leg derailed, causing extensive damage. The machinery's owner sued the railroad. The railroad seeks shelter in two liability limitations contained in contracts that upstream carriers negotiated for the machinery's delivery.

I

This controversy arises from two bills of lading (essentially, contracts) for the transportation of goods from Australia to Alabama. A bill of lading records that a carrier has received goods from the party that wishes to ship them,

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*Briefs of *amici curiae* urging reversal were filed for the Air Transport Association of America, Inc., by *Robert K. Spotswood;* for the American Steamship Owners Mutual Protection and Indemnity Association, Inc., et al. by *David J. Bederman;* for the Association of American Railroads by *Daniel Saphire;* for the National Association of Waterfront Employers by *Thomas D. Wilcox;* for the Transportation Loss Prevention and Security Association by *James Attridge;* and for the World Shipping Council by *Jeffrey F. Lawrence* and *John W. Butler.*

Briefs of *amici curiae* urging affirmance were filed for the American Institute of Marine Underwriters et al. by *Joseph G. Grasso* and *Robert Hermann;* for International Cargo Loss Prevention, Inc., by *Stanley McDermott III;* for the National Industrial Transportation League et al. by *Nicholas J. DiMichael* and *Karyn A. Booth;* for the Transportation Intermediaries Association by *Richard D. Gluck;* for Francesco Berlingieri et al. by *John Paul Jones;* and for Martin Davies by *Susan M. Vance.*

Briefs of *amici curiae* were filed for Public Citizen, Inc., by *Brian Wolfman;* and for Jan Ramberg by *Christopher E. Carey, John B. Gooch, Jr.,* and *Michael W. Lodwick.*

states the terms of carriage, and serves as evidence of the contract for carriage. See 2 T. Schoenbaum, Admiralty and Maritime Law 58–60 (3d ed. 2001) (hereinafter Schoenbaum); Carriage of Goods by Sea Act (COGSA), 49 Stat. 1208, 46 U. S. C. App. § 1303. Respondent James N. Kirby, Pty Ltd. (Kirby), an Australian manufacturing company, sold 10 containers of machinery to the General Motors plant located outside Huntsville, Alabama. Kirby hired International Cargo Control (ICC), an Australian freight forwarding company, to arrange for delivery by "through" (*i. e.*, end-to-end) transportation. (A freight forwarding company arranges for, coordinates, and facilitates cargo transport, but does not itself transport cargo.) To formalize their contract for carriage, ICC issued a bill of lading to Kirby (ICC bill). The bill designates Sydney, Australia, as the port of loading, Savannah, Georgia, as the port of discharge, and Huntsville as the ultimate destination for delivery.

In negotiating the ICC bill, Kirby had the opportunity to declare the full value of the machinery and to have ICC assume liability for that value. Cf. *New York, N. H. & H. R. Co.* v. *Nothnagle*, 346 U. S. 128, 135 (1953) (a carrier must provide a shipper with a fair opportunity to declare value). Instead, and as is common in the industry, see Sturley, Carriage of Goods by Sea, 31 J. Mar. L. & Com. 241, 244 (2000), Kirby accepted a contractual liability limitation for ICC below the machinery's true value, resulting, presumably, in lower shipping rates. The ICC bill sets various liability limitations for the journey from Sydney to Huntsville. For the sea leg, the ICC bill invokes the default liability rule set forth in the COGSA. The COGSA "package limitation" provides:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States . . . unless the nature and value of such goods

> have been declared by the shipper before shipment and inserted in the bill of lading." 46 U. S. C. App. § 1304(5).

For the land leg, in turn, the bill limits the carrier's liability to a higher amount.[1] So that other downstream parties expected to take part in the contract's execution could benefit from the liability limitations, the bill also contains a so-called "Himalaya Clause."[2] It provides:

> "These conditions [for limitations on liability] apply whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." App. to Pet. for Cert. 59a, cl. 10.1.

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[1] The bill provides that "the Freight Forwarder shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor." App. to Pet. for Cert. 57a, cl. 8.3. An SDR, or Special Drawing Right, is a unit of account created by the International Monetary Fund and calculated daily on the basis of a basket of currencies. Liability computed per package for the 10 containers, for example, was approximately $17,373 when the bill of lading issued in June 1997, $17,231 when the goods were damaged on October 9, 1997, and $9,763 when the case was argued. See International Monetary Fund Exchange Rate Archives, http://www.imf.org/external/np/fin/rates/param_rms_mth.cfm (as visited Nov. 5, 2004, and available in Clerk of Court's case file). Respondents claim that liability computed by weight is higher. The machinery's weight is not in the record. In any case, because we conclude that Norfolk is also protected by the $500 per package limit in the second bill of lading at issue here, see Part III–B, *infra*, and thus cannot be liable for more than $5,000 for the 10 containers, each holding one machine, the precise liability under the ICC bill of lading does not matter.

[2] Clauses extending liability limitations take their name from an English case involving a steamship called *Himalaya*. See *Adler* v. *Dickson*, [1955] 1 Q. B. 158 (C. A.).

Meanwhile, Kirby separately insured the cargo for its true value with its co-respondent in this case, Allianz Australia Insurance Ltd. (formerly MMI General Insurance, Ltd.).

Having been hired by Kirby, and because it does not itself actually transport cargo, ICC then hired Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft Eggert & Amsinck (Hamburg Süd), a German ocean shipping company, to transport the containers. To formalize their contract for carriage, Hamburg Süd issued its own bill of lading to ICC (Hamburg Süd bill). That bill designates Sydney as the port of loading, Savannah as the port of discharge, and Huntsville as the ultimate destination for delivery. It adopts COGSA's default rule in limiting the liability of Hamburg Süd, the bill's designated carrier, to $500 per package. See 46 U. S. C. App. § 1304(5). It also contains a clause extending that liability limitation beyond the "tackles"—that is, to potential damage on land as well as on sea. Finally, it too contains a Himalaya Clause extending the benefit of its liability limitation to "all agents . . . (including inland) carriers . . . and all independent contractors whatsoever." App. 63, cl. 5(b).

Acting through a subsidiary, Hamburg Süd hired petitioner Norfolk Southern Railway Company (Norfolk) to transport the machinery from the Savannah port to Huntsville. The Norfolk train carrying the machinery derailed en route, causing an alleged $1.5 million in damages. Kirby's insurance company reimbursed Kirby for the loss. Kirby and its insurer then sued Norfolk in the United States District Court for the Northern District of Georgia, asserting diversity jurisdiction and alleging tort and contract claims. In its answer, Norfolk argued, among other things, that Kirby's potential recovery could not exceed the amounts set forth in the liability limitations contained in the bills of lading for the machinery's carriage.

The District Court granted Norfolk's motion for partial summary judgment, holding that Norfolk's liability was lim-

ited to $500 per container. Upon a joint motion from Norfolk and Kirby, the District Court certified its decision for interlocutory review pursuant to 28 U. S. C. § 1292(b).

A divided panel of the Eleventh Circuit reversed. It held that Norfolk could not claim protection under the Himalaya Clause in the first contract, the ICC bill. It construed the language of the clause to exclude parties, like Norfolk, that had not been in privity with ICC when ICC issued the bill. 300 F. 3d 1300, 1308–1309 (2002). The majority also suggested that "a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier." *Id.*, at 1310. As for the Hamburg Süd bill, the court held that Kirby could be bound by the bill's liability limitation "only if ICC was acting as Kirby's agent when it received Hamburg Süd's bill." *Id.*, at 1305. And, applying basic agency law principles, the Court of Appeals concluded that ICC had not been acting as Kirby's agent when it received the bill. *Ibid.* Based on its opinion that Norfolk was not entitled to benefit from the liability limitation in either bill of lading, the Eleventh Circuit reversed the District Court's grant of summary judgment for the railroad. We granted certiorari to decide whether Norfolk could take shelter in the liability limitations of either bill, 540 U. S. 1099 (2004), and now reverse.

II

The courts below appear to have decided this case on an assumption, shared by the parties, that federal rather than state law governs the interpretation of the two bills of lading. Respondents now object. They emphasize that, at bottom, this is a diversity case involving tort and contract claims arising out of a rail accident somewhere between Savannah and Huntsville. We think, however, borrowing from Justice Harlan, that "the situation presented here has a more genuinely salty flavor than that." *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 742 (1961). When a contract is a maritime

one, and the dispute is not inherently local, federal law controls the contract interpretation. *Id.*, at 735.

Our authority to make decisional law for the interpretation of maritime contracts stems from the Constitution's grant of admiralty jurisdiction to federal courts. See Art. III, § 2, cl. 1 (providing that the federal judicial power shall extend to "all Cases of admiralty and maritime Jurisdiction"). See 28 U. S. C. § 1333(1) (granting federal district courts original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction"); R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 733–738 (5th ed. 2003). This suit was properly brought in diversity, but it could also be sustained under the admiralty jurisdiction by virtue of the maritime contracts involved. See *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 411 (1953) ("[S]ubstantial rights . . . are not to be determined differently whether [a] case is labelled 'law side' or 'admiralty side' on a district court's docket"). Indeed, for federal common law to apply in these circumstances, this suit *must* also be sustainable under the admiralty jurisdiction. See *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U. S. 22, 28 (1988). Because the grant of admiralty jurisdiction and the power to make admiralty law are mutually dependent, the two are often intertwined in our cases.

Applying the two-step analysis from *Kossick*, we find that federal law governs this contract dispute. Our cases do not draw clean lines between maritime and nonmaritime contracts. We have recognized that "[t]he boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw." 365 U. S., at 735. To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. Cf. Admiralty Extension Act, 46 U. S. C. App. § 740 ("The admiralty and maritime jurisdiction of the United States shall extend to

and include all cases of damage or injury . . . caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land"); 1 R. Force & M. Norris, The Law of Seamen § 1:15 (5th ed. 2003). Nor can we simply look to the place of the contract's formation or performance. Instead, the answer "depends upon . . . the nature and character of the contract," and the true criterion is whether it has "reference to maritime service or maritime transactions." *North Pacific S. S. Co.* v. *Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U. S. 119, 125 (1919) (citing *Insurance Co.* v. *Dunham*, 11 Wall. 1, 26 (1871)). See also *Exxon Corp.* v. *Central Gulf Lines, Inc.*, 500 U. S. 603, 611 (1991) ("[T]he trend in modern admiralty case law . . . is to focus the jurisdictional inquiry upon whether the nature of the transaction was maritime").

The ICC and Hamburg Süd bills are maritime contracts because their primary objective is to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States. See G. Gilmore & C. Black, Law of Admiralty 31 (2d ed. 1975) ("Ideally, the [admiralty] jurisdiction [over contracts ought] to include those and only those things principally connected with maritime transportation" (emphasis deleted)). To be sure, the two bills call for some performance on land; the final leg of the machinery's journey to Huntsville was by rail. But under a conceptual rather than spatial approach, this fact does not alter the essentially maritime nature of the contracts.

In *Kossick*, for example, we held that a shipowner's promise to assume responsibility for any improper treatment his seaman might receive at a New York hospital was a maritime contract. The seaman had asked the shipowner to pay for treatment by a private physician, but the shipowner, preferring the cheaper public hospital, offered to cover the costs of any complications that might arise from treatment there. We characterized his promise as a "fringe benefit" to a shipowner's duty in maritime law to provide "'maintenance and

cure.'" 365 U. S., at 736–737. Because the promise was in furtherance of a "peculiarly maritime concer[n]," *id.*, at 738, it folded into federal maritime law. It did not matter that the site of the inadequate treatment—which gave rise to the contract dispute—was in a hospital on land. Likewise, Norfolk's rail journey from Savannah to Huntsville was a "fringe" portion of the intercontinental journey promised in the ICC and Hamburg Süd bills.

We have reiterated that the "'fundamental interest giving rise to maritime jurisdiction is "the protection of maritime *commerce.*"'" *Exxon*, *supra*, at 608 (emphasis added) (quoting *Sisson* v. *Ruby*, 497 U. S. 358, 367 (1990), in turn quoting *Foremost Ins. Co.* v. *Richardson*, 457 U. S. 668, 674 (1982)). The conceptual approach vindicates that interest by focusing our inquiry on whether the principal objective of a contract is maritime commerce. While it may once have seemed natural to think that only contracts embodying commercial obligations between the "tackles" (*i. e.*, from port to port) have maritime objectives, the shore is now an artificial place to draw a line. Maritime commerce has evolved along with the nature of transportation and is often inseparable from some land-based obligations. The international transportation industry "clearly has moved into a new era—the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water, and land." 1 Schoenbaum 589 (4th ed. 2004). The cause is technological change: Because goods can now be packaged in standardized containers, cargo can move easily from one mode of transport to another. *Ibid.* See also *NLRB* v. *Longshoremen*, 447 U. S. 490, 494 (1980) ("'[C]ontainerization may be said to constitute the single most important innovation in ocean transport since the steamship displaced the schooner'"); G. Muller, Intermodal Freight Transportation 15–24 (3d ed. 1995).

Contracts reflect the new technology, hence the popularity of "through" bills of lading, in which cargo owners can con-

tract for transportation across oceans and to inland destinations in a single transaction. See 1 Schoenbaum 595. Put simply, it is to Kirby's advantage to arrange for transport from Sydney to Huntsville in one bill of lading, rather than to negotiate a separate contract—and to find an American railroad itself—for the land leg. The popularity of that efficient choice, to assimilate land legs into international ocean bills of lading, should not render bills for ocean carriage nonmaritime contracts.

Some lower federal courts appear to have taken a spatial approach when deciding whether intermodal transportation contracts for intercontinental shipping are maritime in nature. They have held that admiralty jurisdiction does not extend to contracts which require maritime and nonmaritime transportation, unless the nonmaritime transportation is merely incidental—and that long-distance land travel is not incidental. See, *e. g.*, *Hartford Fire Ins. Co.* v. *Orient Overseas Containers Lines (UK) Ltd.*, 230 F. 3d 549, 555–556 (CA2 2000) ("Transport by land under a bill of lading is not 'incidental' to transport by sea if the land segment involves great and substantial distances," and land transport of over 850 miles across four countries is more than incidental); *Sea-Land Serv., Inc.* v. *Danzig*, 211 F. 3d 1373, 1378 (CA Fed. 2000) (holding that intermodal transport contracts were not maritime contracts because they called for "substantial transportation between inland locations and ports both in this country and in the Middle East" that was not incidental to the transportation by sea); *Kuehne & Nagel (AG & Co.)* v. *Geosource, Inc.*, 874 F. 2d 283, 290 (CA5 1989) (holding that a through bill of lading calling for land transportation up to 1,000 miles was not a traditional maritime contract because such "extensive land-based operations cannot be viewed as merely incidental to the maritime operations"). As a preliminary matter, it seems to us imprecise to describe the land carriage required by an intermodal transportation contract as "incidental"; realistically, each leg of the journey

is essential to accomplishing the contract's purpose. In this case, for example, the bills of lading required delivery to Huntsville; the Savannah port would not do.

Furthermore, to the extent that these lower court decisions fashion a rule for identifying maritime contracts that depends solely on geography, they are inconsistent with the conceptual approach our precedent requires. See *Kossick*, *supra*, at 735. Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land carriage. Geography, then, is useful in a conceptual inquiry only in a limited sense: If a bill's *sea* components are insubstantial, then the bill is not a maritime contract.

Having established that the ICC and Hamburg Süd bills are maritime contracts, then, we must clear a second hurdle before applying federal law in their interpretation. Is this case inherently local? For not "every term in every maritime contract can only be controlled by some federally defined admiralty rule." *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, 313 (1955) (applying state law to maritime contract for marine insurance because of state regulatory power over insurance industry). A maritime contract's interpretation may so implicate local interests as to beckon interpretation by state law. See *Kossick*, 365 U. S., at 735. Respondents have not articulated any specific Australian or state interest at stake, though some are surely implicated. But when state interests cannot be accommodated without defeating a federal interest, as is the case here, then federal substantive law should govern. See *id.*, at 739 (the process of deciding whether federal law applies "is surely . . . one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction"); 2

Schoenbaum 61 ("'Bills of lading issued outside the United States are governed by the general maritime law, considering relevant choice of law rules'").

Here, our touchstone is a concern for the uniform meaning of maritime contracts like the ICC and Hamburg Süd bills. We have explained that Article III's grant of admiralty jurisdiction "'must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'" *American Dredging Co.* v. *Miller*, 510 U. S. 443, 451 (1994) (quoting *The Lottawanna*, 21 Wall. 558, 575 (1875)). See also *Yamaha Motor Corp., U. S. A.* v. *Calhoun*, 516 U. S. 199, 210 (1996) ("[I]n several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision" (citing *Kossick*, *supra*, at 742; *Pope & Talbot*, 346 U. S., at 409; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248–249 (1942))); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 373 (1959) ("[S]tate law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope").

Applying state law to cases like this one would undermine the uniformity of general maritime law. The same liability limitation in a single bill of lading for international intermodal transportation often applies both to sea and to land, as is true of the Hamburg Süd bill. Such liability clauses are regularly executed around the world. See 1 Schoenbaum 595; Wood, Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues, 46 Am. J. Comp. L. 403, 407 (Supp. 1998). See also

46 U. S. C. App. § 1307 (permitting parties to extend the COGSA default liability limit to damage done "prior to the loading on and subsequent to the discharge from the ship"). Likewise, a single Himalaya Clause can cover both sea and land carriers downstream, as is true of the ICC bill. See Part III–A, *infra*. Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning. As we said in *Kossick*, when "a [maritime] contract . . . may well have been made anywhere in the world," it "should be judged by one law wherever it was made." 365 U. S., at 741. Here, that one law is federal.

In protecting the uniformity of federal maritime law, we also reinforce the liability regime Congress established in COGSA. By its terms, COGSA governs bills of lading for the carriage of goods "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U. S. C. App. § 1301(e). For that period, COGSA's "package limitation" operates as a default rule. § 1304(5). But COGSA also gives the option of extending its rule by contract. See § 1307 ("Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea"). As COGSA permits, Hamburg Süd in its bill of lading chose to extend the default rule to the entire period in which the machinery would be under its responsibility, including the period of the inland transport. Hamburg Süd would not enjoy the efficiencies of the default rule if the liability limitation it chose did not apply equally to all legs of the journey for which it undertook responsibility. And the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated.

III

A

Turning to the merits, we begin with the ICC bill of lading, the first of the contracts at issue. Kirby and ICC made a contract for the carriage of machinery from Sydney to Huntsville, and agreed to limit the liability of ICC and other parties who would participate in transporting the machinery. The bill's Himalaya Clause states:

> "These conditions [for limitations on liability] apply whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against *any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract.*" App. to Pet. for Cert. 59a, cl. 10.1 (emphasis added).

The question presented is whether the liability limitation in Kirby's and ICC's contract extends to Norfolk, which is ICC's sub-subcontractor. The Circuits have split in answering this question. Compare, *e. g.*, *Akiyama Corp. of America* v. *M. V. Hanjin Marseilles*, 162 F. 3d 571, 574 (CA9 1998) (privity of contract is not required in order to benefit from a Himalaya Clause), with *Mikinberg* v. *Baltic S. S. Co.*, 988 F. 2d 327, 332 (CA2 1993) (a contractual relationship is required).

This is a simple question of contract interpretation. It turns only on whether the Eleventh Circuit correctly applied this Court's decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297 (1959). We conclude that it did not. In *Herd*, the bill of lading between a cargo owner and carrier said that, consistent with COGSA, "'the Carrier's liability, if any, shall be determined on the basis of $500 per package.'" *Id.*, at 302. The carrier then hired a stevedoring company to load the cargo onto the ship, and the stevedoring company damaged the goods. The Court held that the stevedoring company was not a beneficiary of the bill's liability limitation. Because it found no evidence in COGSA

or its legislative history that Congress meant COGSA's liability limitation to extend automatically to a carrier's agents, like stevedores, the Court looked to the language of the bill of lading itself. It reasoned that a clause limiting "'the Carrier's liability'" did not "indicate that the contracting parties intended to limit the liability of stevedores or other agents. . . . If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract." *Ibid.* The Court added that liability limitations must be "strictly construed and limited to intended beneficiaries." *Id.*, at 305.

The Eleventh Circuit, like respondents, made much of the *Herd* decision. Deriving a principle of narrow construction from *Herd*, the Court of Appeals concluded that the language of the ICC bill's Himalaya Clause is too vague to clearly include Norfolk. 300 F. 3d, at 1308. Moreover, the lower court interpreted *Herd* to require privity between the carrier and the party seeking shelter under a Himalaya Clause. 300 F. 3d, at 1308. But nothing in *Herd* requires the linguistic specificity or privity rules that the Eleventh Circuit attributes to it. The decision simply says that contracts for carriage of goods by sea must be construed like any other contracts: by their terms and consistent with the intent of the parties. If anything, *Herd* stands for the proposition that there is no special rule for Himalaya Clauses.

The Court of Appeals' ruling is not true to the contract language or to the intent of the parties. The plain language of the Himalaya Clause indicates an intent to extend the liability limitation broadly—to "*any* servant, agent or other person (including *any* independent contractor)" whose services contribute to performing the contract. App. to Pet. for Cert. 59a, cl. 10.1 (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). There is no reason to con-

travene the clause's obvious meaning. See *Green* v. *Biddle*, 8 Wheat. 1, 89–90 (1823) ("[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded"). The expansive contract language corresponds to the fact that various modes of transportation would be involved in performing the contract. Kirby and ICC contracted for the transportation of machinery from Australia to Huntsville, Alabama, and, as the crow flies, Huntsville is some 366 miles inland from the port of discharge. See G. Fitzpatrick & M. Modlin, Direct-Line Distances 168 (1986). Thus, the parties must have anticipated that a land carrier's services would be necessary for the contract's performance. It is clear to us that a railroad like Norfolk was an intended beneficiary of the ICC bill's broadly written Himalaya Clause. Accordingly, Norfolk's liability is limited by the terms of that clause.

B

The question arising from the Hamburg Süd bill of lading is more difficult. It requires us to set an efficient default rule for certain shipping contracts, a task that has been a challenge for courts for centuries. See, *e. g.*, *Hadley* v. *Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854). ICC and Hamburg Süd agreed that Hamburg Süd would transport the machinery from Sydney to Huntsville, and agreed to the COGSA "package limitation" on the liability of Hamburg Süd, its agents, and its independent contractors. The second question presented is whether that liability limitation, which ICC negotiated, prevents Kirby from suing Norfolk (Hamburg Süd's independent contractor) for more. As we have explained, the liability limitation in the ICC bill, the first contract, sets liability for a land accident higher than this bill does. See n. 1, *supra*. Because Norfolk's liability will be lower if it is protected by the Hamburg Süd bill too, we must reach this second question in order to give Norfolk the full relief for which it petitioned.

To interpret the Hamburg Süd bill, we turn to a rule drawn from our precedent about common carriage: When an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed. The intermediary is certainly not automatically empowered to be the cargo owner's agent in every sense. That would be unsustainable. But when it comes to liability limitations for negligence resulting in damage, an intermediary can negotiate reliable and enforceable agreements with the carriers it engages.

We derive this rule from our decision about common carriage in *Great Northern R. Co.* v. *O'Connor*, 232 U. S. 508 (1914). In *Great Northern*, an owner hired a transfer company to arrange for the shipment of her goods. Without the owner's express authority, the transfer company arranged for rail transport at a tariff rate that limited the railroad's liability to less than the true value of the goods. The goods were lost en route, and the owner sued the railroad. The Court held that the railroad must be able to rely on the liability limitation in its tariff agreement with the transfer company. The railroad "had the right to assume that the Transfer Company could agree upon the terms of the shipment"; it could not be expected to know if the transfer company had any outstanding, conflicting obligation to another party. *Id.*, at 514. The owner's remedy, if necessary, was against the transfer company. *Id.*, at 515.

Respondents object to our reading of *Great Northern*, and argue that this Court should fashion the federal rule of decision from general agency law principles. Like the Eleventh Circuit, respondents reason that Kirby cannot be bound by the bill of lading that ICC negotiated with Hamburg Süd unless ICC was then acting as Kirby's agent. Other Courts of Appeals have also applied agency law to cases similar to this one. See, *e. g.*, *Kukje Hwajae Ins. Co.* v. *The M/V Hyundai Liberty*, 294 F. 3d 1171, 1175–1177 (CA9 2002) (an

intermediary acted as a cargo owner's agent when negotiating a bill of lading with a downstream carrier).

We think reliance on agency law is misplaced here. It is undeniable that the traditional indicia of agency, a fiduciary relationship and effective control by the principal, did not exist between Kirby and ICC. See Restatement (Second) of Agency § 1 (1957). But that is of no moment. The principle derived from *Great Northern* does not require treating ICC as Kirby's agent in the classic sense. It only requires treating ICC as Kirby's agent for a *single, limited* purpose: when ICC contracts with subsequent carriers for limitation on liability. In holding that an intermediary binds a cargo owner to the liability limitations it negotiates with downstream carriers, we do not infringe on traditional agency principles. We merely ensure the reliability of downstream contracts for liability limitations. In *Great Northern*, because the intermediary had been "entrusted with goods to be shipped by railway, and, nothing to the contrary appearing, the carrier had the right to assume that [the intermediary] could agree upon the terms of the shipment." 232 U. S., at 514. Likewise, here we hold that intermediaries, entrusted with goods, are "agents" only in their ability to contract for liability limitations with carriers downstream.

Respondents also contend that any decision binding Kirby to the Hamburg Süd bill's liability limitation will be disastrous for the international shipping industry. Various participants in the industry have weighed in as *amici* on both sides in this case, and we must make a close call. It would be idle to pretend that the industry can easily be characterized, or that efficient default rules can easily be discerned. In the final balance, however, we disagree with respondents for three reasons.

First, we believe that a limited agency rule tracks industry practices. In intercontinental ocean shipping, carriers may not know if they are dealing with an intermediary, rather

than with a cargo owner. Even if knowingly dealing with an intermediary, they may not know how many other intermediaries came before, or what obligations may be outstanding among them. If the Eleventh Circuit's rule were the law, carriers would have to seek out more information before contracting, so as to assure themselves that their contractual liability limitations provide true protection. That task of information gathering might be very costly or even impossible, given that goods often change hands many times in the course of intermodal transportation. See 1 Schoenbaum 589; Wood, 46 Am. J. Comp. L., at 404.

Second, if liability limitations negotiated with cargo owners were reliable while limitations negotiated with intermediaries were not, carriers would likely want to charge the latter higher rates. A rule prompting downstream carriers to distinguish between cargo owners and intermediary shippers might interfere with statutory and decisional law promoting nondiscrimination in common carriage. Cf. *ICC* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 251–256 (1911) (common carrier cannot "sit in judgment on the title of the prospective shipper"); Shipping Act, 46 U. S. C. App. § 1709 (nondiscrimination rules). It would also, as we have intimated, undermine COGSA's liability regime.

Finally, as in *Great Northern*, our decision produces an equitable result. See 232 U. S., at 515. Kirby retains the option to sue ICC, the carrier, for any loss that exceeds the liability limitation to which they agreed. And indeed, Kirby *has* sued ICC in an Australian court for damages arising from the Norfolk derailment. It seems logical that ICC—the only party that definitely knew about and was party to both of the bills of lading at issue here—should bear responsibility for any gap between the liability limitations in the bills. Meanwhile, Norfolk enjoys the benefit of the Hamburg Süd bill's liability limitation.

IV

We hold that Norfolk is entitled to the protection of the liability limitations in the two bills of lading. Having undertaken this analysis, we recognize that our decision does no more than provide a legal backdrop against which future bills of lading will be negotiated. It is not, of course, this Court's task to structure the international shipping industry. Future parties remain free to adapt their contracts to the rules set forth here, only now with the benefit of greater predictability concerning the rules for which their contracts might compensate.

The judgment of the United States Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Per Curiam

SMITH *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 04–5323. Decided November 15, 2004

The supplemental nullification instruction given at the punishment phase of petitioner's capital murder trial allowed the Texas jury to give effect to his mitigation evidence only by negating what would otherwise be affirmative responses to two special issues relating to deliberateness and future dangerousness. Pursuant to this instruction, the jury sentenced petitioner to death. The Texas Court of Criminal Appeals denied him postconviction relief, reasoning that the instruction either was irrelevant because petitioner did not proffer "constitutionally significant" mitigation evidence, or was distinguishable from the instruction in *Penry* v. *Johnson*, 532 U. S. 782, 797 *(Penry II)*, which this Court found constitutionally inadequate because it did not allow a jury to give "*full* consideration and *full* effect to mitigating circumstances" in choosing an appropriate sentence.

Held: Petitioner's evidence was relevant mitigation evidence under *Tennard* v. *Dretke*, 542 U. S. 274, and *Penry* v. *Lynaugh*, 492 U. S. 302; therefore, the nullification instruction was constitutionally inadequate under *Penry II*. In rejecting the precise threshold "constitutionally significant" test used here, the *Tennard* Court held that a jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a "low threshold for relevance." 542 U. S., at 285. Because petitioner's proffered evidence was relevant under this Court's precedents, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence. In *Penry II*, the Texas courts' supplemental instruction did not give the jury an adequate vehicle for expressing a "reasoned moral response" to all of the evidence relevant to the defendant's culpability. 532 U. S., at 796. Any distinctions between that supplemental instruction and the one here are constitutionally insignificant.

Certiorari granted; 132 S. W. 3d 407, reversed and remanded.

PER CURIAM.

Petitioner LaRoyce Lathair Smith was convicted of capital murder and sentenced to death by a jury in Dallas County, Texas. Before the jury reached its sentence, the trial judge

issued a supplemental "nullification instruction." *Ex parte Smith*, 132 S. W. 3d 407, 409 (Tex. Crim. App. 2004). That instruction directed the jury to give effect to mitigation evidence, but allowed the jury to do so only by negating what would otherwise be affirmative responses to two special issues relating to deliberateness and future dangerousness. In *Penry* v. *Johnson*, 532 U. S. 782 (2001) *(Penry II)*, we held a similar "nullification instruction" constitutionally inadequate because it did not allow the jury to give "'*full* consideration and *full* effect to mitigating circumstances'" in choosing the defendant's appropriate sentence. *Id.*, at 797 (quoting *Johnson* v. *Texas*, 509 U. S. 350, 381 (1993) (O'CONNOR, J., dissenting)). Despite our holding in *Penry II*, the Texas Court of Criminal Appeals rejected petitioner's request for postconviction relief. The court reasoned that the instruction either was irrelevant because petitioner did not proffer "constitutionally significant" mitigation evidence, or was sufficiently distinguishable from the instruction in *Penry II* to survive constitutional scrutiny. 132 S. W. 3d, at 413, n. 21. We grant the petition for certiorari and petitioner's motion for leave to proceed *in forma pauperis*, and reverse.

I

In 1991, petitioner was convicted of brutally murdering one of his former co-workers at a Taco Bell in Dallas County. The victim and one of her co-workers were closing down the restaurant when petitioner and several friends asked to be let in to use the telephone. The two employees recognized petitioner and let him in. Petitioner then told his former co-workers to leave because he wanted to rob the restaurant. When they did not leave, petitioner killed one co-worker by pistol-whipping her and shooting her in the back. Petitioner also threatened, but did not harm, his other former co-worker before exiting with his friends. The jury found petitioner guilty of capital murder beyond a reasonable doubt.

At the punishment phase, the jury was instructed on two special issues: first, whether the killing was deliberate; and second, whether the defendant posed a continuing danger to others.[1] Approximately two years prior to the trial, we had held that presenting only these two special issues, without additional instructions regarding the jury's duty to consider mitigation evidence, violated the Eighth Amendment. *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989) *(Penry I)*. Shortly after petitioner's trial, the Texas Legislature amended its capital sentencing scheme to require juries to take "into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant" in deciding whether there are sufficient mitigating circumstances to warrant a sentence of life imprisonment rather than a death sentence. *Penry II*, *supra*, at 803 (quoting Tex. Code Crim. Proc. Ann., Art. 37.071(2)(e)(1) (Vernon Supp. 2001)). Petitioner, however, did not receive the benefit of the new statutory instruction at his trial. Instead, just as in *Penry II*, petitioner was sentenced pursuant to a supplemental instruction provided to the jury by the trial judge.[2] That instruction read:

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[1] The text of the special issues given to the jury was as follows: "(1) Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result? (2) Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" Pet. for Cert. 5.

[2] The supplemental instruction in *Penry II* stated: "'You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, *you must* decide how much weight they deserve, if any, and there-

"'You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.

"'In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas

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fore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.'" 532 U. S., at 789–790 (emphasis added).

must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

"'You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve.'" 132 S. W. 3d, at 409.

Employing the framework of special issues modified by the supplemental nullification instruction, the jury considered a variety of mitigation evidence. Petitioner presented evidence that (1) he had been diagnosed with potentially organic learning disabilities and speech handicaps at an early age; (2) he had a verbal IQ score of 75 and a full IQ of 78 and, as a result, had been in special education classes throughout most of his time in school; (3) despite his low IQ and learning disabilities, his behavior at school was often exemplary; (4) his father was a drug addict who was involved with gang violence and other criminal activities, and regularly stole money from family members to support a drug addiction; and (5) he was only 19 when he committed the crime.

In response, the prosecution submitted evidence demonstrating that petitioner acted deliberately and cruelly. The prosecution emphasized that petitioner knew his victim, yet stabbed her repeatedly in numerous places on her body. With respect to petitioner's future dangerousness, the prosecution stressed that petitioner had previously been convicted of misdemeanor assault and proffered evidence suggesting that he had violated several drug laws.

During closing arguments at the punishment phase, the prosecution reminded the jury of its duty to answer truthfully the two special issues of deliberateness and future dangerousness.

> "Now, when we talked to you on voir dire, we talked to you about—and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, 'Mr. Nancarrow, Ms. McDaniel, if you prove to me that the answers to those special issues should be yes, then I can answer them yes.' If you wavered, if you hesitated one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now." Pet. for Cert. 6.

The jury verdict form tracked the final reminders the prosecution gave the jury. The form made no mention of nullification. Nor did it say anything about mitigation evidence. Instead, the verdict form asked whether petitioner committed the act deliberately and whether there was a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. The jury was allowed to give "Yes" or "No" answers only. The jury answered both questions "Yes" and sentenced petitioner to death. App. 4 to Pet. for Cert.

On direct appeal, petitioner argued that our holding in *Penry I* rendered his jury instructions unconstitutional because the special issues did not allow the jury to give effect to his mitigation evidence. The Texas Court of Criminal Appeals affirmed petitioner's sentence, reasoning that the nullification instruction provided an adequate vehicle through which the jury could consider petitioner's evidence. We denied certiorari on May 15, 1995. *Smith* v. *Texas*, 514 U. S. 1112.

Petitioner filed an original writ of habeas corpus in the trial court in 1998. That suit was dismissed as untimely, but the Texas Legislature amended its criminal code in such a way as to allow petitioner to file a timely writ. Petitioner did so, claiming that his jury was instructed in violation of

the Eighth Amendment. Before the Texas Court of Criminal Appeals, petitioner argued that the jury instructions in his case ran afoul of our holding in *Penry II*. The court denied petitioner's application on the merits. 132 S. W. 3d 407 (2004).[3]

II

The Texas Court of Criminal Appeals issued its opinion just prior to our decision in *Tennard* v. *Dretke*, 542 U. S. 274 (2004). In *Tennard*, we reversed the Fifth Circuit's refusal to grant a certificate of appealability to a defendant who was sentenced under the Texas capital sentencing scheme prior to the legislative revisions which took place in the aftermath of *Penry I*. Tennard, relying upon *Penry I*, argued that Texas' two special issues—deliberateness and future dangerousness—did not allow the jury to give effect to his mitigation evidence and that the trial court's failure to issue a supplemental mitigation instruction that would allow the jury to give full effect to his evidence rendered his death sentence unconstitutional. The state court and the Fifth Circuit both held that the lack of an adequate mitigation instruction was irrelevant. The courts both determined that Tennard had failed to satisfy the Fifth Circuit's threshold standard for "'constitutionally relevant' mitigating evidence, that is, evidence of a 'uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,' and evidence that 'the criminal act was attributable to this severe permanent condition.'" 542 U. S., at 281 (some internal quotation marks omitted).

Our rejection of that threshold test was central to our decision to reverse in *Tennard*. We held that "[t]he Fifth Circuit's test has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evi-

[3] Four judges would have found petitioner's claim procedurally defaulted. See 132 S. W. 3d, at 417 (Hervey, J., concurring); *id.*, at 428 (Holcomb, J., concurring). The majority of the court, however, declined to adopt this holding and reached petitioner's claims on the merits.

dence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment." *Id.*, at 284. Rather, we held that the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a "low threshold for relevance," which is satisfied by "'"evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value."'" *Id.*, at 284–285 (quoting *McKoy* v. *North Carolina*, 494 U. S. 433, 440 (1990)).

The Texas Court of Criminal Appeals relied on precisely the same "screening test" we held constitutionally inadequate in *Tennard*. 132 S. W. 3d, at 413 (holding that mitigation evidence requires a special instruction only when that evidence passes the threshold test of "whether the defendant's criminal act was 'due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own'" (quoting *Robertson* v. *Cockrell*, 325 F. 3d 243, 251 (CA5 2003) (en banc))). Employing this test, the court concluded that petitioner's low IQ and placement in special-education classes were irrelevant because they did not demonstrate that he suffered from a "severe disability." 132 S. W. 3d, at 414. But, as we explained in *Tennard*, "[e]vidence of significantly impaired intellectual functioning is obviously evidence that 'might serve as a basis for a sentence less than death.'" 542 U. S., at 288 (quoting *Skipper* v. *South Carolina*, 476 U. S. 1, 5 (1986); some internal quotation marks omitted). There is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death. Indeed, we have held that a defendant's IQ score of 79, a score slightly higher than petitioner's, constitutes relevant mitigation evidence. See *Wiggins* v. *Smith*, 539 U. S. 510, 535 (2003); cf. *Tennard*, *supra*, at 288.

The state court also held that petitioner had offered "no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder." 132 S. W. 3d, at 414. We rejected the Fifth Circuit's "nexus" requirement in *Tennard, supra,* at 287 (noting that none of our prior opinions "suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered" and holding that the jury must be allowed the opportunity to consider *Penry* evidence even if the defendant cannot establish "a nexus to the crime").

That petitioner's evidence was relevant for mitigation purposes is plain under our precedents, even those predating *Tennard.* See, *e. g., Penry I,* 492 U. S., at 319–322; *Payne* v. *Tennessee,* 501 U. S. 808, 822 (1991); *Boyde* v. *California,* 494 U. S. 370, 377–378 (1990); *Eddings* v. *Oklahoma,* 455 U. S. 104, 114 (1982). The state court, however, erroneously relied on a test we never countenanced and now have unequivocally rejected. We therefore hold that the state court "assessed [petitioner's legal] claim under an improper legal standard." *Tennard, supra,* at 287. Because petitioner's proffered evidence was relevant, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence. Whether the "nullification instruction" satisfied that charge is the question to which we now turn.

III

The Texas Court of Criminal Appeals held that even if petitioner did proffer relevant mitigation evidence, the supplemental "nullification instruction" provided to the jury adequately allowed the jury to give effect to that evidence. The court found it significant that the supplemental instruction in this case "told the jury that it 'shall' consider all mitigating evidence, even evidence unrelated to the special issues, [and] it also told the jury how to answer the special issues to give effect to that mitigation evidence." 132 S. W.

3d, at 416. The court also concluded that the nullification instruction made it clear to the jury that a "No" answer was required if it "believed that the death penalty was not warranted because of the mitigating circumstances." *Ibid.*

In *Penry II*, we held that "the key under *Penry I* is that the jury be able to 'consider and *give effect to* [a defendant's mitigation] evidence in imposing sentence.'" 532 U. S., at 797 (quoting *Penry I*, *supra*, at 319); see 532 U. S., at 797 ("'[A] sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances'" (quoting *Johnson* v. *Texas*, 509 U. S., at 381 (O'CONNOR, J., dissenting); emphasis in *Johnson*)). We explained at length why the supplemental instruction employed by the Texas courts did not provide the jury with an adequate vehicle for expressing a "reasoned moral response" to *all* of the evidence relevant to the defendant's culpability. 532 U. S., at 796. Although there are some distinctions between the *Penry II* supplemental instruction and the instruction petitioner's jury received, those distinctions are constitutionally insignificant.

Penry II identified a broad and intractable problem—a problem that the state court ignored here—inherent in any requirement that the jury nullify special issues contained within a verdict form.

> "We generally presume that jurors follow their instructions. Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues, answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a '"true verdict."'

> "The mechanism created by the supplemental instruction thus inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependent on their willingness' to elevate the supplemental instruction over the verdict form instructions. There is, at the very least, 'a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration' of Penry's mental retardation and childhood abuse. The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence." *Id.*, at 799–800 (citations omitted).

It is certainly true that the mandatory aspect of the nullification instruction made petitioner's instruction distinct from Penry's. Indeed, the "shall" command in the nullification instruction resolved the ambiguity inherent in the *Penry II* instruction, which we held was *either* a nullification instruction or an instruction that "'shackled and confined'" Penry's mitigating evidence within the scope of the impermissibly narrow special issues. *Id.*, at 798. That being said, the clearer instruction given to petitioner's jury did not resolve the ethical problem described *supra*, at 46 and this page.[4] To the contrary, the mandatory language in the

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[4] The concurring opinions below straightforwardly recognized this problem. See 132 S. W. 3d 407, 427 (Tex. Crim. App. 2004) (Hervey, J., concurring) (concluding that the "'nullification' instruction would, as a matter of federal constitutional law, suffer from the same defect as the one in *Penry II* had applicant presented any mitigating evidence that was beyond 'the effective reach of the sentencer'" and conceding that the instruction given to petitioner may have been inadequate "as a matter of federal constitutional law"); *id.*, at 428 (Holcomb, J., concurring) ("The nullification instruction provided to Smith's jury contained the same defects the Supreme Court identified in *Penry II*. Therefore, the jury was unconstitutionally precluded from considering and giving effect to Smith's mitigating evidence").

charge could possibly have intensified the dilemma faced by ethical jurors. Just as in *Penry II*, petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented.[5] Even if we were to assume that the jurors could easily and effectively have comprehended an orally delivered instruction directing them to disregard, in certain limited circumstances, a mandatory written instruction given at a later occasion, that would not change the fact that the "jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence." *Penry II*, 532 U. S., at 801.

There is no principled distinction, for Eighth Amendment purposes, between the instruction given to petitioner's jury and the instruction in *Penry II*. Petitioner's evidence was relevant mitigation evidence for the jury under *Tennard* and *Penry I*. We therefore hold that the nullification instruction was constitutionally inadequate under *Penry II*. The judgment of the Texas Court of Criminal Appeals is reversed,

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[5] There is another similarity between this case and *Penry II*. In *Penry II*, we found it significant that the prosecutor admonished the jury to "'follow your oath, the evidence and the law'" prior to the deliberations in which the jury was required to fill out the verdict form. 532 U. S., at 802. We held that this statement sent the jury "mixed signals" and "only reminded the jurors that they had to answer the special issues *dis*honestly in order to give effect to Penry's mitigating evidence." *Ibid.* The prosecutor here similarly reminded the jury that each and every one of them had promised to "follow the law" and return a "Yes" answer to the special issues so long as the State met its burden of proof. Pet. for Cert. 6. Thus, the nullification instruction presented the same ethical dilemma here and, what is more, it seems that despite the inclusion of the mandatory "shall" language, the nullification instruction may have been more confusing for the jury to implement in practice than the state court assumed.

and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I would affirm the judgment of the Texas Court of Criminal Appeals. See *Walton* v. *Arizona*, 497 U. S. 639, 673 (1990) (SCALIA, J., concurring in part and concurring in judgment).

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KOONS BUICK PONTIAC GMC, INC. *v.* NIGH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03–377. Argued October 5, 2004—Decided November 30, 2004

As enacted in 1968, the Truth in Lending Act's (TILA) civil-liability provision, 15 U. S. C. § 1640, authorized statutory damages for violations of TILA prescriptions governing consumer loans as follows: "(a) [A]ny creditor who fails in connection with any consumer credit transaction to disclose to any person any information required . . . is liable to that person in an amount . . . of . . . (1) twice the amount of the finance charge in connection with the transaction, except that liability under this paragraph shall not be less than $100 nor greater than $1,000." In 1974, Congress added a new paragraph (1) to § 1640(a) to allow for the recovery of actual damages and to provide separate statutory damages for class actions. Congress simultaneously amended the original statutory damages provision to limit it to individual actions, moved that provision from § 1640(a)(1) to § 1640(a)(2)(A), and retained the $100/$1,000 minimum and maximum recoveries. Congress accounted for the statute's restructuring by changing the phrase "under this paragraph" to "under this subparagraph." A 1976 amendment redesignated § 1640(a)(2)(A)'s statutory damages provision as § 1640(a)(2)(A)(i), inserted a new clause (ii) setting statutory damages for individual actions relating to consumer leases, and retained the $100/$1,000 brackets on recovery. Following the latter amendment, the lower federal courts consistently held that the $100/$1,000 brackets remained applicable to all consumer financing transactions, whether lease or loan. Finally, in 1995, Congress added a new clause (iii) at the end of § 1640(a)(2)(A), so that the statute now authorizes statutory damages equal to "(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000."

Respondent Nigh attempted to purchase a used truck from petitioner Koons Buick Pontiac GMC. Unable to find a lender to complete the financing, Koons Buick twice revised the retail installment sales con-

tract presented to Nigh. After signing the third contract, Nigh discovered that the second contract had contained an improperly documented charge for a car alarm that Nigh never requested, agreed to accept, or received. Nigh made no payments on the truck and returned it to Koons Buick. He then filed suit against Koons Buick alleging, among other things, a TILA violation and seeking uncapped recovery of twice the finance charge, $24,192.80, under clause (i) of § 1640(a)(2)(A). The District Court held that damages were not capped at $1,000, and the jury awarded Nigh the full uncapped amount. In affirming, the Fourth Circuit held that the 1995 amendment not only raised the statutory damages recoverable for TILA violations involving real-property-secured closed-end loans, it also removed the $1,000 cap on recoveries involving loans secured by personal property. The Court of Appeals held that its previous view that the $1,000 cap applied to both clauses (i) and (ii) of § 1640(a)(2)(A) was rendered defunct when Congress struck the "or" preceding clause (ii) and inserted clause (iii) after the "under this subparagraph" phrase. According to the court, the inclusion of the new $200/$2,000 brackets in clause (iii) shows that the clause (ii) $100/$1,000 brackets can no longer be interpreted to apply to all of subparagraph (A), but must now apply solely to clause (ii), so as not to render meaningless the new minimum and maximum recoveries articulated in clause (iii). The court therefore allowed Nigh to recover the full uncapped amount of $24,192.80.

Held: The 1995 amendment left unaltered the $100/$1,000 limits prescribed from the start for TILA violations involving personal-property loans. Both the conventional meaning of "subparagraph" and standard interpretive guides point to the same conclusion: The $1,000 cap applies to recoveries under clause (i). Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections. Under that scheme, the word "subparagraph" is used to refer to a subdivision preceded by a capital letter and the word "clause" to a subdivision preceded by a lower case Roman numeral. Congress followed this scheme in drafting TILA. For example, § 1640(a)(2)(B), which covers statutory damages in TILA class actions, states: "[T]he total recovery *under this subparagraph* . . . shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor . . . ." (Emphasis added.) Had Congress meant to repeal the longstanding $100/$1,000 limitation on § 1640(a)(2)(A)(i), thereby confining the $100/$1,000 limitation solely to clause (ii), Congress likely would have stated in clause (ii): "liability under this clause." The statutory history resolves any ambiguity whether the $100/$1,000 brackets apply to recoveries under clause (i). Before 1995, clauses (i) and (ii) set statutory damages for the entire

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realm of TILA-regulated consumer credit transactions. Closed-end mortgages were encompassed by clause (i). The addition of clause (iii) makes closed-end mortgages subject to a higher floor and ceiling, but clause (iii) contains no other measure of damages. Clause (i)'s specification of statutory damages of twice the finance charge continues to apply to loans secured by real property as it does to loans secured by personal property. Clause (iii) removes closed-end mortgages from clause (i)'s governance only to the extent that clause (iii) prescribes higher brackets. There is scant indication that Congress meant to alter the meaning of clause (i) when it added clause (iii). Cf. *Church of Scientology of Cal.* v. *IRS*, 484 U. S. 9, 17–18. The history demonstrates that, by adding clause (iii), Congress sought to provide *increased recovery* when a TILA violation occurs in the context of a loan secured by real property. It would be passing strange to read the statute to cap recovery in connection with a closed-end, real-property-secured loan at an amount *substantially lower* than the recovery available when a violation occurs in the context of a personal-property-secured loan or an open-end, real-property-secured loan. The text does not dictate this result; the statutory history suggests otherwise; and there is scant indication Congress meant to change the well-established meaning of clause (i). Pp. 60–64.

319 F. 3d 119, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 65. KENNEDY, J., filed a concurring opinion, in which REHNQUIST, C. J., joined, *post*, p. 66. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 67. SCALIA, J., filed a dissenting opinion, *post*, p. 70.

Donald B. Ayer argued the cause for petitioner. With him on the briefs were *William K. Shirey II* and *Arthur M. Schwartzstein.*

A. Hugo Blankingship III argued the cause for respondent. With him on the brief were *Allison M. Zieve* and *Brian Wolfman.**

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*Briefs of *amici curiae* urging reversal were filed for the American Bankers Association et al. by *Roy T. Englert, Jr.*, *Alan E. Untereiner*, and *Max Huffman;* for the Michigan Bankers Association by *John J. Bursch;* for the National Automobile Dealers Association by *Paul R. Norman;* and

JUSTICE GINSBURG delivered the opinion of the Court.

The meaning of a subparagraph in a section of the Truth in Lending Act (TILA or Act), 15 U. S. C. § 1601 *et seq.*, is at issue in this case. As originally enacted in 1968, the provision in question bracketed statutory damages for violations of TILA prescriptions governing consumer loans: $100 was made the minimum recovery and $1,000, the maximum award. In 1995, Congress added a new clause increasing recovery for TILA violations relating to closed-end loans "secured by real property or a dwelling." § 1640(a)(2)(A)(iii). In lieu of the $100/$1,000 minimum and maximum recoveries, Congress substituted $200/$2,000 as the floor and ceiling.

Less-than-meticulous drafting of the 1995 amendment created an ambiguity. A divided panel of the United States Court of Appeals for the Fourth Circuit held that the 1995 amendment not only raised the statutory damages recoverable for TILA violations involving real-property-secured loans, it also removed the $1,000 cap on recoveries involving loans secured by personal property. We reverse that determination and hold that the 1995 amendment left unaltered the $100/$1,000 limits prescribed from the start for TILA violations involving personal-property loans. The purpose of the 1995 amendment is not in doubt: Congress meant to raise the minimum and maximum recoveries for closed-end loans secured by real property. There is scant indication that Congress simultaneously sought to remove the $1,000 cap on loans secured by personal property.

I

Congress enacted TILA in 1968, as part of the Consumer Credit Protection Act, Pub. L. 90–321, 82 Stat. 146, as

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for the Virginia Automobile Dealers Association et al. by *Michael G. Charapp, Brad D. Weiss,* and *Allen Jones, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the Commercial Law League of America by *Manuel H. Newburger* and *Barbara M. Barron;* and for the National Association of Consumer Advocates et al. by *Richard J. Rubin* and *Joanne S. Faulkner.*

amended, 15 U. S. C. § 1601 *et seq.*, to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit," § 102, codified in 15 U. S. C. § 1601(a). The Act requires a creditor to disclose information relating to such things as finance charges, annual percentage rates of interest, and borrowers' rights, see §§ 1631–1632, 1635, 1637–1639, and it prescribes civil liability for any creditor who fails to do so, see § 1640. As originally enacted in 1968, the Act provided for statutory damages of twice the finance charge in connection with the transaction, except that recovery could not be less than $100 or greater than $1,000.[1] The original civil-liability provision stated:

> "(a) [A]ny creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount . . . of
>
> "(1) twice the amount of the finance charge in connection with the transaction, except that liability under this paragraph shall not be less than $100 nor greater than $1,000 . . . ." Pub. L. 90–321, § 130, 82 Stat. 157.

In 1974, Congress amended TILA's civil-liability provision, 15 U. S. C. § 1640(a), to allow for the recovery of actual damages in addition to statutory damages and to provide separate statutory damages for class actions. Pub. L. 93–495, § 408(a), 88 Stat. 1518. Congress reworded the original statutory damages provision to limit it to individual actions, moved the provision from § 1640(a)(1) to § 1640(a)(2)(A), and retained the $100/$1,000 brackets on recovery. In order to account for the restructuring of the statute, Congress

[1] The finance charge is determined, with certain exceptions, by "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." 15 U. S. C. § 1605(a).

changed the phrase "under this paragraph" to "under this subparagraph." The amended statute provided for damages in individual actions as follows:

> "(a) [A]ny creditor who fails to comply with any requirement imposed under this chapter . . . is liable to such person in an amount equal to the sum of—
>
> "(1) any actual damage sustained by such person as a result of the failure;
>
> "(2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000 . . . ." § 408(a), 88 Stat. 1518.

A further TILA amendment in 1976 applied truth-in-lending protections to consumer leases. Consumer Leasing Act of 1976, 90 Stat. 257. Congress inserted a clause into § 1640(a)(2)(A) setting statutory damages for individual actions relating to consumer leases at 25% of the total amount of monthly payments under the lease. Again, Congress retained the $100/$1,000 brackets on statutory damages. The amended § 1640(a)(2)(A) provided for statutory damages equal to

> "(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000 . . . ." Pub. L. 94–240, § 4(2), 90 Stat. 260, codified in 15 U. S. C. § 1640(a) (1976 ed.).

Following the insertion of the consumer lease provision, courts consistently held that the $100/$1,000 limitation remained applicable to all consumer financing transactions,

whether lease or loan. See, *e. g.*, *Purtle* v. *Eldridge Auto Sales, Inc.*, 91 F. 3d 797, 800 (CA6 1996); *Cowen* v. *Bank United of Tex., FSB*, 70 F. 3d 937, 941 (CA7 1995); *Mars* v. *Spartanburg Chrysler Plymouth, Inc.*, 713 F. 2d 65, 67 (CA4 1983); *Dryden* v. *Lou Budke's Arrow Finance Co.*, 661 F. 2d 1186, 1191, n. 7 (CA8 1981) *(per curiam); Williams* v. *Public Finance Corp.*, 598 F. 2d 349, 358, 359, n. 17 (CA5 1979).

In 1995, Congress amended TILA's statutory damages provision once more. The 1995 amendment, which gave rise to the dispute in this case, added a new clause (iii) at the end of § 1640(a)(2)(A), setting a $200 floor and $2,000 ceiling for statutory damages in an individual action relating to a closed-end credit transaction "secured by real property or a dwelling." Truth in Lending Act Amendments of 1995, Pub. L. 104–29, § 6, 109 Stat. 274. These closed-end real estate loans, formerly encompassed by clause (i), had earlier been held subject to the $100/$1,000 limitation. See, *e. g.*, *Mayfield* v. *Vanguard Sav. & Loan Assn.*, 710 F. Supp. 143, 146 (ED Pa. 1989) (ordering "the maximum statutory award of $1,000" for each TILA violation concerning a secured real estate loan). Section 1640(a), as amended in 1995, thus provides for statutory damages equal to

> "(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000 . . . ."

Shortly after the passage of the 1995 TILA amendments, the Office of the Comptroller of the Currency issued an official policy announcement describing the changes. With respect to changes in TILA's civil-liability provisions, the announcement stated only that "[p]unitive damages have been increased for transactions secured by real property or a dwelling from a maximum of $1,000 to a maximum of $2,000 *(closed-end credit only)*." Administrator of National Banks, Truth in Lending Act Amendments of 1995, OCC Bulletin 96–1, p. 2 (Jan. 5, 1996).

In 1997, the Seventh Circuit, in *Strange* v. *Monogram Credit Card Bank of Ga.*, 129 F. 3d 943, held that the meaning of clauses (i) and (ii) remained untouched by the addition of clause (iii). The Seventh Circuit observed that prior to the addition of clause (iii) in 1995, "[c]ourts uniformly interpreted the final clause, which established the $100 minimum and the $1,000 maximum, as applying to both (A)(i) and (A)(ii)." *Id.*, at 947. The 1995 amendment, the Seventh Circuit reasoned, "was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards for the other two parts of § 1640(a)(2)(A)." *Ibid.* As *Strange* illustrates, TILA violations may involve finance charges that, when doubled, are less than $100. There, double-the-finance-charge liability was $54.27, entitling the plaintiff to the $100 minimum. *Id.*, at 945, 947.

II

On February 4, 2000, respondent Bradley Nigh attempted to purchase a used 1997 Chevrolet Blazer truck from petitioner Koons Buick Pontiac GMC. Nigh traded in his old vehicle and signed a buyer's order and a retail installment sales contract reflecting financing to be provided by Koons Buick. 319 F. 3d 119, 121–122 (CA4 2003). Koons Buick could not find a lender to purchase an assignment of the pay-

ments owed under the sales contract and consequently restructured the deal to require a larger downpayment. *Id.*, at 122. On February 25, after Koons Buick falsely told Nigh that his trade-in vehicle had been sold, Nigh signed a new retail installment sales contract. *Ibid.* Once again, however, Koons Buick was unable to find a willing lender. *Ibid.* Nigh ultimately signed, under protest, a third retail installment sales contract. *Ibid.*

Nigh later discovered one reason why Koons Buick had been unable to find an assignee for the installment payments due under the second contract: That contract contained an improperly documented charge of $965 for a Silencer car alarm Nigh never requested, agreed to accept, or received. *Ibid.* Nigh made no payments on the Blazer and returned the truck to Koons Buick. *Id.*, at 123.

On October 3, 2000, Nigh filed suit against Koons Buick alleging, among other things, a violation of TILA. Nigh sought uncapped recovery of twice the finance charge, an amount equal to $24,192.80. Koons Buick urged a $1,000 limitation on statutory damages under § 1640(a)(2)(A)(i). The District Court held that damages were not capped at $1,000, and the jury awarded Nigh $24,192.80 (twice the amount of the finance charge). *Id.*, at 121; App. in No. 01–2201 etc. (CA4), pp. 653–655, 670, 756–757, 764.

A divided panel of the Fourth Circuit affirmed. 319 F. 3d, at 126–129. The Court of Appeals acknowledged that it had previously interpreted the $1,000 cap to apply to clauses (i) and (ii). *Id.*, at 126; see *Mars* v. *Spartanburg Chrysler Plymouth, Inc.*, 713 F. 2d, at 67. But the majority held that "by striking the 'or' preceding (ii), and inserting (iii) after the 'under this subparagraph' phrase," Congress had "rendered *Mars*' interpretation defunct." 319 F. 3d, at 126. According to the majority: "The inclusion of the new maximum and minimum in (iii) shows that the clause previously interpreted to apply to all of (A), can no longer apply to (A), but must now apply solely to (ii), so as not to render meaningless

the maximum and minimum articulated in (iii)." *Id.*, at 127.[2] The Court of Appeals therefore allowed Nigh to recover the full uncapped amount of $24,192.80 under clause (i).

Judge Gregory dissented. The new clause (iii), he stated, operates as a specific "carve-out" for real estate transactions from the general rule establishing the $100/$1,000 liability limitation. *Id.*, at 130, 132. Both parties acknowledged, and it was Fourth Circuit law under *Mars*, 713 F. 2d 65, that, before 1995, the $100/$1,000 brackets applied to the entire subparagraph. 319 F. 3d, at 130. Judge Gregory found "no evidence that Congress intended to override the Fourth Circuit's long-standing application of the $1,000 cap to both (2)(A)(i) and (2)(A)(ii)." *Id.*, at 131. If the $1,000 cap applied only to clause (ii), the dissent reasoned, the phrase "under this subparagraph" in clause (ii) would be "superfluous," because "the meaning of (ii) would be unchanged by its deletion." *Id.*, at 132. Moreover, Judge Gregory added, limiting the $1,000 cap to recoveries for consumer leases under clause (ii) would create an inconsistency within the statute: The damages cap in clause (ii) would include the "under this subparagraph" modifier, but the cap in clause (iii) would not. *Ibid.*[3]

We granted certiorari, 540 U. S. 1148 (2004), to resolve the division between the Fourth Circuit and the Seventh Circuit on the question whether the $100 floor and $1,000 ceiling apply to recoveries under § 1640(a)(2)(A)(i). We now re-

[2] The dissent adopts a similar structural argument to justify its conclusion that the $100/$1,000 brackets apply only to recoveries under clause (ii). See *post*, at 70–71.

[3] Judge Gregory noted that the phrase "under this subparagraph," as it appears in § 1640(a)(2)(B), covering statutory damages in class actions, "indisputably applies to all of subparagraph (B)." 319 F. 3d 119, 132 (CA4 2003). "[T]he most logical interpretation of the statute," he concluded, "is to read the phrase 'under this subparagraph' as applying generally to an entire subparagraph, either (A) or (B), and to read (2)(A)(iii) as creating a specific carve-out from that general rule for real-estate transactions." *Ibid.*

verse the judgment of the Court of Appeals for the Fourth Circuit.

III

Statutory construction is a "holistic endeavor." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988); accord *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 455 (1993); *Smith* v. *United States*, 508 U. S. 223, 233 (1993). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.*, 484 U. S., at 371 (citations omitted); see also *McCarthy* v. *Bronson*, 500 U. S. 136, 139 (1991) (statutory language must be read in its proper context and not viewed in isolation). In this case, both the conventional meaning of "subparagraph" and standard interpretive guides point to the same conclusion: The $1,000 cap applies to recoveries under clause (i).

Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections. See L. Filson, The Legislative Drafter's Desk Reference 222 (1992) (hereinafter Desk Reference). This hierarchy is set forth in drafting manuals prepared by the legislative counsel's offices in the House and the Senate. The House manual provides:

> "To the maximum extent practicable, a section should be broken into—
>
> "(A) subsections (starting with (a));
>
> "(B) paragraphs (starting with (1));
>
> "(C) subparagraphs (starting with (A));
>
> "(D) clauses (starting with (i)) . . . ." House Legislative Counsel's Manual on Drafting Style, HLC No. 104–1, p. 24 (1995).

The Senate manual similarly provides:

> "A section is subdivided and indented as follows:
> "(a) SUBSECTION.—
> "(1) PARAGRAPH.—
> "(A) SUBPARAGRAPH.—
> "(i) CLAUSE.—" Senate Office of the Legislative Counsel, Legislative Drafting Manual 10 (1997).[4]

Congress followed this hierarchical scheme in drafting TILA. The word "subparagraph" is generally used to refer to a subdivision preceded by a capital letter,[5] and the word "clause" is generally used to refer to a subdivision preceded by a lower case Roman numeral.[6] Congress applied this hierarchy in § 1640(a)(2)(B), which covers statutory damages in TILA class actions and states: "[T]he total recovery *under this subparagraph* . . . shall not be more than the lesser

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[4] These congressional drafting manuals, both postdating the 1995 TILA amendment, are consistent with earlier guides. See, *e. g.*, Desk Reference 222 ("Federal statutes . . . are always broken down successively into . . . subparagraphs (starting with subparagraph (A)), [and] clauses (starting with clause (i)) . . . ."); D. Hirsch, Drafting Federal Law § 3.8, p. 27 (2d ed. 1989) ("Paragraphs are divided into tabulated lettered subparagraphs ('(A)', '(B)', etc.) . . . . Subparagraphs are divided into clauses bearing small roman numerals ('(i)', '(ii)', '(iii)', '(iv)') . . . ."); R. Dickerson, The Fundamentals of Legal Drafting § 8.25, p. 197 (2d ed. 1986) ("For divisions of a paragraph (called 'subparagraphs'), use '(A),' '(B),' '(C),' etc. . . . When an additional designated breakdown is necessary, use '(i),' '(ii),' '(iii),' etc."); J. Peacock, Notes on Legislative Drafting 12 (1961) (paragraphs divided into "*sub-paragraphs* designated (A), (B), (C)," and subparagraphs further divided into "*clauses* (i), (ii), (iii)").

[5] *E. g.*, 15 U. S. C. § 1602(aa)(2)(A) ("under this subparagraph"); § 1602(aa)(2)(B) ("under subparagraph (A)"); § 1605(f)(2)(A) ("except as provided in subparagraph (B)"); § 1615(c)(1)(B) ("pursuant to subparagraph (A)"); § 1637(c)(4)(D) ("in subparagraphs (A) and (B)"). But see § 1637a(a)(6)(C) ("subparagraph" appears not to refer to a capital-letter subdivision).

[6] *E. g.*, § 1637(a)(6)(B)(ii) ("described in clause (i)"); § 1637a(a)(8)(B) ("described in clauses (i) and (ii) of subparagraph (A)"); § 1640(i)(1)(B)(ii) ("described in clause (i)").

of $500,000 or 1 per centum of the net worth of the creditor . . . ." (Emphasis added.) In 1995, Congress plainly meant "to establish a more generous minimum and maximum" for closed-end mortgages. *Strange*, 129 F. 3d, at 947. On that point, there is no disagreement. Had Congress simultaneously meant to repeal the longstanding $100/$1,000 limitation on § 1640(a)(2)(A)(i), thereby confining the $100/$1,000 limitation solely to clause (ii), Congress likely would have flagged that substantial change. At the very least, a Congress so minded might have stated in clause (ii): "liability under this clause."

The statutory history resolves any ambiguity whether the $100/$1,000 brackets apply to recoveries under clause (i).[7] Before 1995, clauses (i) and (ii) set statutory damages for the entire realm of TILA-regulated consumer credit transactions. Closed-end mortgages were encompassed by clause (i). See, *e. g.*, *Mayfield* v. *Vanguard Sav. & Loan Assn.*, 710 F. Supp., at 146. As a result of the addition of clause (iii), closed-end mortgages are subject to a higher floor and ceiling. But clause (iii) contains no other measure of damages. The specification of statutory damages in clause (i) of twice the finance charge continues to apply to loans secured by real property as it does to loans secured by personal property.[8] Clause (iii) removes closed-end mortgages from clause (i)'s governance only to the extent that clause (iii) prescribes $200/$2,000 brackets in lieu of $100/$1,000.[9]

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[7] The five separate writings this Court has produced demonstrate that § 1640(a)(2)(A) is hardly a model of the careful drafter's art.

[8] In consumer credit transactions in which a security interest is taken in the borrower's principal dwelling, the borrower also has a right to rescission under certain circumstances. § 1635.

[9] The dissent's reading, we note, hinges on an assumed alteration in Congress' design, assertedly effected by the bare addition of "(iii)" and the transposition of "or." See *post*, at 71–72, and n. 1. If Congress had not added "(iii)" when it raised the cap on recovery for closed-end mortgages, the meaning of the amended text would be beyond debate. The limitations provision would read: "except that the liability under this subpara-

There is scant indication that Congress meant to alter the meaning of clause (i) when it added clause (iii). Cf. *Church of Scientology of Cal.* v. *IRS*, 484 U. S. 9, 17–18 (1987) ("All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill."). By adding clause (iii), Congress sought to provide *increased recovery* when a TILA violation occurs in the context of a loan secured by real property. See, *e. g.*, H. R. Rep. No. 104–193, p. 99 (1995) ("[T]his amendment increases the statutory damages available in closed end credit transactions secured by real property or a dwelling . . . ."). But cf. *post*, at 75 (SCALIA, J., dissenting) (hypothesizing that far from focusing on *raising* damages recoverable for closed-end mortgage transactions, Congress may have "focus[ed] more intently on limiting damages" for that category of loans). "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward*, 279 U. S. 337, 339 (1929) (Holmes, J.). It would be passing strange to read the statute to cap recovery in connection with a closed-end, real-property-secured loan at an amount *substantially lower* than the recovery available when a violation occurs in the context of a personal-property-secured loan or an open-end, real-property-secured loan.[10] The text does not dictate this result; the statutory

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graph shall not be less than $100 nor greater than $1,000, or in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000."

[10] This reading would lead to the anomalous result of double-the-finance-charge liability, uncapped by the fixed dollar limit, under clause (i) for an open-end loan secured by real property, while liability would be capped by clause (iii) at $2,000 for a closed-end loan secured by the same real property. TILA does not in general apply to credit transactions in which the total amount financed exceeds $25,000, but this limit does not

history suggests otherwise; and there is scant indication Congress meant to change the well-established meaning of clause (i).

* * *

For the reasons stated, the judgment of the Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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apply to loans "secured by real property or a dwelling." 15 U. S. C. § 1603. Double-the-finance-charge liability under clause (i) for a TILA violation in connection with an open-end, real-property-secured loan (*e. g.*, a home equity line of credit), could far exceed the $2,000 liability cap under clause (iii) for a TILA violation in connection with a standard closed-end home mortgage.

The dissent states that fixed mortgages are more prevalent than home equity lines of credit and that the mean home equity line of credit balance is considerably smaller than the mean first mortgage balance. *Post*, at 74–75. But even under the dissent's reading, a borrower stands to collect greater statutory damages if a TILA violation occurs in connection with a home equity line of credit than if it occurs in connection with a home mortgage acquisition loan. According to figures compiled by the Consumer Bankers Association and the Federal Reserve Board, in 2004 the average new home equity line of credit was $77,526, see Consumer Bankers Assn., CBA news release, Home Equity Lines Adjust on Prime Rate Change, Nov. 10, 2004, available at http://www.cbanet.org/news/press%20releases/home_equity/prime_rate_adjust.htm (as visited Nov. 15, 2004, and available in Clerk of Court's case file), and about a third of extended credit lines are mostly or fully in use, see G. Canner, T. Durkin, & C. Luckett, Recent Developments in Home Equity Lending, 84 Fed. Res. Bull. 241, 247 (Apr. 1998) (30% of home equity lines of credit 75%–100% in use in 1997). Assuming, as the dissent does, a 10% annual interest rate, the annual finance charge could easily surpass $7,000, and double-the-finance-charge liability would substantially exceed the $2,000 cap prescribed for home mortgage loans. Additionally, the dissent's observation does not address the anomaly, illustrated by the facts of this case, of providing full double-the-finance-charge liability for recoveries under clause (i), while capping recoveries under clause (iii). Nigh was awarded over $24,000 in damages for a violation involving a car loan. Had similar misconduct occurred in connection with a home mortgage, he would have received no more than $2,000 in statutory damages.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, concurring.

If an unambiguous text describing a plausible policy decision were a sufficient basis for determining the meaning of a statute, we would have to affirm the judgment of the Court of Appeals. The ordinary reader would think that 15 U. S. C. § 1640(a)(2)(A) is a paragraph including three subparagraphs identified as (i), (ii), and (iii). There is nothing implausible about a scheme that uses a formula to measure the maximum recovery under (i) without designating a ceiling or floor. Thus we cannot escape this unambiguous statutory command by proclaiming that it would produce an absurd result.

We can, however, escape by using common sense. The history of the provision makes it perfectly clear that Congress did not intend its 1995 amendment adding (iii) to repeal the pre-existing interpretation of (i) as being limited by the ceiling contained in (ii). Thus, the Court unquestionably decides this case correctly. It has demonstrated that a busy Congress is fully capable of enacting a scrivener's error into law.

In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product.[1] Common sense is often

[1] See *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 611, n. 4 (1991) ("[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than from ignoring it"); *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543–544 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" (footnote omitted)); *United States* v. *Fisher*, 2 Cranch 358, 386 (1805) (Marshall, C. J.) ("Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived"). We execute our duty as judges

more reliable than rote repetition of canons of statutory construction.[2] It is unfortunate that wooden reliance on those canons has led to unjust results from time to time.[3] Fortunately, today the Court has provided us with a lucid opinion that reflects the sound application of common sense.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, concurring.

In the case before us, there is a respectable argument that the statutory text, 15 U. S. C. § 1640(a)(2)(A)(ii), provides unambiguous instruction in resolving the issue: The word "subparagraph" directs that the $1,000 cap applies to recoveries under both clause (A)(i) and clause (A)(ii), as both fall under subparagraph (A). Were we to adopt that analysis, our holdings in cases such as *Lamie* v. *United States Trustee*, 540 U. S. 526, 533–535 (2004), *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992), and *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241–242 (1989), would be applicable, absent a showing that the result made little or no sense.

The Court properly chooses not to rest its holding solely on the words of the statute. That is because of a counterargument that "subparagraph" cannot be read straightforwardly to apply to all of subparagraph (A) in light of the different recovery cap of $2,000 for recoveries under clause (A)(iii). I agree with the Court's decision to proceed on the premise that the text is not altogether clear. That means that examination of other interpretive resources, including

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most faithfully when we arrive at an interpretation only after "seek[ing] guidance from every reliable source." A. Barak, Judicial Discretion 62 (Y. Kaufmann transl. 1989).

[2] See Stevens, The Shakespeare Canon of Statutory Construction, 140 U. Pa. L. Rev. 1373, 1383 (1992).

[3] See, *e. g.*, *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438 (2002); *United States* v. *James*, 478 U. S. 597 (1986); *United States* v. *Locke*, 471 U. S. 84 (1985).

predecessor statutes, is necessary for a full and complete understanding of the congressional intent. This approach is fully consistent with cases in which, because the statutory provision at issue had only one plausible textual reading, we did not rely on such sources. In the instant case, the Court consults extratextual sources and, in my view, looking to these materials confirms the usual interpretation of the word "subparagraph."

With these observations, I join the Court's opinion.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the judgment of the Court of Appeals should be reversed. I write separately, however, because I believe that it is unnecessary to rely on inferences from silence in the legislative history or the perceived anomalous results posed by an alternative interpretation to answer the question presented in this case. See *ante*, at 63, and n. 10. Instead, in my view, the text of 15 U. S. C. § 1640(a)(2)(A) prior to Congress' 1995 amendment to it, the consistent interpretation that the Courts of Appeals had given to the statutory language prior to the amendment, and the text of the amendment itself make clear that Congress tacked on a provision addressing a very specific set of transactions otherwise covered by the Truth in Lending Act (TILA) but not materially altering the provisions at issue here.

If the text in this case were clear, resort to anything else would be unwarranted. See *Lamie* v. *United States Trustee*, 540 U. S. 526, 532–533 (2004). But I agree with the Court that § 1640(a)(2)(A) is ambiguous, *ante*, at 53, rather than unambiguous as JUSTICE STEVENS contends, *ante*, at 65 (concurring opinion), because on its face it is susceptible of several plausible interpretations. Congress, as the Court points out, used "'subparagraph'" consistently in TILA, albeit not with perfect consistency, to refer to a third-level division introduced by a capital letter. See *ante*, at 60–62,

and n. 4. This consistent usage points toward the view that "subparagraph" here refers to the whole of subdivision (A). But other textual evidence is in tension with that reading. As the Court of Appeals correctly pointed out and JUSTICE SCALIA notes, *post*, at 72 (dissenting opinion), if "subparagraph" refers to the whole of subdivision (A), the limit of $100–$1,000 for liability set forth in clause (ii) is in direct conflict with the $200–$2,000 limit on liability found in clause (iii). 319 F. 3d 119, 126–127 (CA4 2003). Still other textual clues point away from the Court of Appeals' reading. It is possible, for example, to read the $100–$1,000 limit in clause (ii) to be an exception that applies only to the liability set forth in clauses (i) and (ii), since it comes after clauses (i) and (ii) but before clause (iii). These conflicting textual indicators show that, whatever the practices suggested in the manuals relied upon by the Court, *ante*, at 60–61, and n. 4, § 1640(a)(2)(A) is not a model of the best practices in legislative drafting.

The statutory history of § 1640(a)(2)(A) resolves this ambiguity. Prior to the 1995 amendment, the meaning of subdivisions (A)(i) and (ii) was clear. As the Court recounts, after the 1976 amendment and prior to 1995, § 1640(a) provided for statutory damages equal to

> "(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000." 15 U. S. C. § 1640(a) (1976 ed.).

See *ante*, at 55. There is no doubt that under this version of the statute the phrase "under this subparagraph" extended the liability limits to subdivision (A)(i) as well as subdivision (A)(ii). As noted above, "subparagraph" is gener-

ally used in TILA to refer to a section's third-level subdivision introduced by a capital letter. By virtue of the phrase "under this subparagraph," the liability extended to the whole of subdivision (A). The placement of this clause at the end of subdivision (A) further indicated that it was meant to refer to the whole of subdivision (A). The clarity of the meaning is borne out by the Courts of Appeals' consistent application of the limit to both clauses (i) and (ii) as they stood before the 1995 amendment. *Purtle* v. *Eldridge Auto Sales, Inc.*, 91 F. 3d 797, 800 (CA6 1996); *Cowen* v. *Bank United of Tex., FSB*, 70 F. 3d 937, 941 (CA7 1995); *Mars* v. *Spartanburg Chrysler Plymouth, Inc.*, 713 F. 2d 65, 67, and n. 6 (CA4 1983); *Dryden* v. *Lou Budke's Arrow Finance Co.*, 661 F. 2d 1186, 1191, n. 7 (CA8 1981) *(per curiam); Williams* v. *Public Finance Corp.*, 598 F. 2d 349, 359, and n. 17 (CA5 1979).

Congress' 1995 amendment did not materially alter the text of § 1640(a)(2)(A)(i) or (ii). It removed "or" between clauses (i) and (ii) and placed it between clause (ii) and the new clause (iii). Pub. L. 104–29, § 6, 109 Stat. 274. Apart from this change, it neither deleted any language from clause (i) or clause (ii) nor added any language to these clauses. The only substantive change that amendment wrought was the creation of clause (iii), which established a higher $2,000 cap on damages for a very specific set of credit transactions—closed-end credit transactions secured by real property or a dwelling—that had previously been covered by § 1640(a)(2)(A)(i) and subject to the lower $1,000 cap. *Ibid.* By so structuring the amendment, Congress evinced its intent to address only the creation of a different limit for a specific set of transactions.

In light of this history, as well as the text's clear meaning prior to the 1995 amendment and the lower courts' consistent application of the limit in clause (ii) to clause (i) prior to the 1995 amendment, the limit in clause (ii) remains best read as applying also to clause (i).

JUSTICE SCALIA, dissenting.

The Court views this case as a dispute about the meaning of "subparagraph" in 15 U. S. C. § 1640(a)(2)(A). I think it involves more than that. For while I agree with the construction of that word adopted by the Court, see *ante*, at 60–62, by JUSTICE KENNEDY, see *ante*, at 66–67 (concurring opinion), and by JUSTICE THOMAS, see *ante*, at 67–68 (opinion concurring in judgment), I disagree with the conclusion that the Court believes follows. The ultimate question here is not the meaning of "subparagraph," but the scope of the exception which contains that term. When is "liability under this subparagraph" limited by the $100/$1,000 brackets? In answering that question, I would give dispositive weight to the structure of § 1640(a)(2)(A), which indicates that the exception is part of clause (ii) and thus does not apply to clause (i).

After establishing the fact that "subparagraph" refers to a third-level subdivision within a section, denominated by a capital letter (here subparagraph (A)), see *ante*, at 60–62, the Court's analysis proceeds in five steps. First, the Court presumes that this fact determines the scope of the exception. See *ante*, at 62. It does not. In context, the reference to "liability under this subparagraph" is indeterminate. Since it is not a freestanding limitation, but an exception to the liability imposed by clause (ii), it is quite possible to read it as saying that, *in the consumer-lease cases covered by clause (ii)*, "the liability under this subparagraph" would be subject to the $100/$1,000 brackets. Using "subparagraph" in that way would hardly be nonsensical, since the *only* liability under subparagraph (A) that applies to consumer-lease cases is the amount of damages specified by clause (ii). In other words, if the exception is part of clause (ii), then "liability under this subparagraph" is actually synonymous with "liability under this clause," cf. *ibid.*, in the sense that either phrase would have the same effect were it to appear in clause

(ii). As a result, the term "subparagraph" cannot end our inquiry.

The structure of subparagraph (A) provides the best indication of whether the exception is part of clause (ii). In simplified form, the subparagraph reads: "(i) . . . , (ii) . . . , or (iii) . . . ." Clauses (i), (ii), and (iii) are separated by commas, and an "or" appears before clause (iii). It is reasonable to conclude that the exception—which appears between "(ii)" and the comma that precedes "or (iii)"—is part of clause (ii). In fact, the Court admits in passing that the exception appears "*in* clause (ii)." *Ibid.* (emphasis added); see also *ante*, at 65 (STEVENS, J., concurring) (referring to "the ceiling contained *in* (ii)" (emphasis added)). Yet the Court's holding necessarily assumes that the exception somehow stands outside of clause (ii)—someplace where its reference to "subparagraph" can have a different effect than "clause" would. The Court effectively requires the exception to be either part of clauses (i) and (ii) simultaneously, or a part of subparagraph (A) that is not within any of the individual clauses. The legislative drafting manuals cited by the Court, see *ante*, at 60–61, and n. 4, reveal how unnatural such an unanchored subdivision would be. See L. Filson, The Legislative Drafter's Desk Reference 223 (1992) ("If a section or other statutory unit contains subdivisions of any kind, it should never contain subdivisions of any other kind *unless they are parts of one of those subdivisions*" (emphasis added)); House Legislative Counsel's Manual on Drafting Style, HLC No. 104–1, p. 24 (1995) ("If there is a subdivision of the text of a unit, there should not be a different kind of subdivision of that unit *unless the latter is part of the 1st subdivision*" (emphasis added)); Senate Office of the Legislative Counsel, Legislative Drafting Manual 10–11 (1997) (explaining how to avoid "using a cut-in followed by flush language," that is, inserting a clause that is supposed to apply to (a)(1) and (a)(2) after (2) rather than between (a) and (a)(1)).

In its second step, the Court notes that, before 1995, the exception was generally read as applying to both clauses (i) and (ii). See *ante*, at 62. But the prior meaning is insufficient to reveal the meaning of the current version. As JUSTICE THOMAS points out, the placement of the exception "at the end of subdivision (A)" used to "indicat[e] that it was meant to refer to the whole of subdivision (A)." *Ante*, at 69. That inference, however, is no longer available, since Congress eliminated the "or" between clauses (i) and (ii) and added clause (iii). If the "or" were still there, it might just be possible to conceive of clauses (i) and (ii) as a sublist to which the exception attached as a whole. But one simply does not find a purportedly universal exception at the end of the second item in a three-item list.

The Court's third step addresses clause (iii), which is not directly implicated by the facts of this case. The Court concludes that the underlying measure of damages in clause (i) (twice the finance charge) "continues to apply" to actions governed by the newly created clause (iii). *Ante*, at 62. That conclusion does not follow from merely reading the exception in clause (ii) to apply to clause (i), but it is necessary because, by reading "subparagraph" in the exception to have the effect of extending the exception to all of subparagraph (A), the Court has caused *that* exception to conflict with the higher limit in clause (iii). To remedy this, the Court proceeds (see *ante*, at 62–63, n. 9) to do further violence to § 1640(a)(2)(A), simply reading out its division into clauses (i), (ii), and (iii) entirely.[1] It is not sound statutory construc-

[1] In footnote 9, the Court asserts that its new reading merely requires one to pretend that "Congress had not added '(iii)' when it raised the cap on recovery." That is not so—not, at least, if the Court adheres to the sound drafting principles that supposedly form the basis for its opinion. See *supra*, at 71. To adhere to *those* and also to apply both the limitation of clause (ii) and the limitation of clause (iii) to clause (i), one must "pretend" that Congress not only had not added "(iii)" but also had eliminated "(i)" and "(ii)." Otherwise, those limits which are recited in clause (ii) would apply only to that clause.

tion to create a conflict by ignoring one feature of a statute and then to solve the problem by ignoring yet another. My construction of the exception in clause (ii) avoids the conflict altogether.

In its fourth step, the Court returns to the application of the $100/$1,000 brackets to clause (i). The Court finds "scant indication that Congress meant to alter the meaning of clause (i)" in 1995 and compares this to "'Sir Arthur Conan Doyle's "dog that didn't bark."'" *Ante*, at 63 (quoting *Church of Scientology of Cal.* v. *IRS*, 484 U. S. 9, 17–18 (1987)). I hardly think it "scant indication" of intent to alter that Congress *amended the text of the statute* by moving the exception from the end of the list to the middle, making it impossible, without doing violence to the text, to read the exception as applying to the entire list. Needless to say, I also disagree with the Court's reliance on things that the sponsors and floor managers of the 1995 amendment *failed* to say.[2] I have often criticized the Court's use of legislative history because it lends itself to a kind of ventriloquism. The Congressional Record or committee reports are used to make words appear to come from Congress's mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists). The Canon of Canine Silence that the Court invokes today introduces a reverse—and at least equally dangerous—phenomenon, under which courts may refuse to believe

[2] The things that *were* said about the 1995 amendment are characteristically unhelpful. Rep. McCollum said: "[T]he bill raises the statutory damages for individual actions from $1,000 to $2,000." 141 Cong. Rec. 26576 (1995); see also *id.*, at 26898 (remarks of Sen. Mack) (same). Two weeks later, he "clarif[ied]" his remarks by specifying that the amendments "apply solely to loans secured by real estate." *Id.*, at 27703 (statement of Reps. McCollum and Gonzalez). Taken literally, these floor statements could mean that the new $2,000 limit applies either to *all* "individual actions" under subparagraph (A), or to all "loans secured by real estate" under clauses (i) *and* (iii). Neither option is consistent with the Court's conclusion that there is a $1,000 limit under clause (i).

Congress's *own* words unless they can see the lips of others moving in unison. See *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 385, n. 2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning").

In its fifth and final step, the Court asserts that it would be "anomalous" for liability to be "uncapped by the [$1,000] limit" when real property secures an open-end loan but capped by the $2,000 limit when it secures a closed-end loan, and that it would be "passing strange" for damages to be "*substantially lower*" under clause (iii) than under clause (i). *Ante*, at 63, and n. 10. The lack of a $1,000 limit does not, of course, make liability under clause (i) limitless. In all cases under clause (i), the damages are twice the finance charge, and the 1-year statute of limitations, 15 U. S. C. § 1640(e), naturally limits the amount of damages that can be sought.

More importantly, Congress would have expected the amounts financed (and thus the finance charges) under clause (i) to be generally much lower than those under clause (iii). In cases (like this one) where loans are not secured by real property, the amount financed can be no greater than $25,000. § 1603(3). Where loans are secured by real property, clause (iii) includes both first mortgages and second mortgages (or home equity loans), which are far more common and significantly larger than the open-end home equity lines of credit (HELOCs) that are still covered by clause (i). In 1994, 64% of home-owning households had first or second mortgages, but only 7% had HELOCs with outstanding balances. Survey Research Center, Univ. of Michigan, National Survey of Home Equity Loans 25 (Oct. 1998) (Table 1) (hereinafter National Survey). The mean first mortgage balance was $66,884; the mean second mortgage balance was $16,199; and the mean HELOC outstanding balance was

$18,459. *Ibid.*[3] Assuming a 10% interest rate (which would have been higher than a typical HELOC in 1994, see G. Canner & C. Luckett, Home Equity Lending: Evidence from Recent Surveys, 80 Fed. Res. Bull. 571, 582 (1994)), a year of finance charges on the mean HELOC would still have been less than $2,000—which, when doubled, would still be less than two times the maximum damages under clause (iii), a disproportion no greater than what Congress has explicitly prescribed between clauses (ii) and (iii). In addition, very large outstanding balances on HELOCs are comparatively rare. In 2001, roughly 94% of them were less than the *median* outstanding mortgage principal of $69,227. See U. S. Census Bureau, American Housing Survey for the United States: 2001, pp. 150, 152 (Oct. 2002) (Table 3–15) (hereinafter American Housing Survey).[4] Approximately 2% of HELOC balances were $100,000 or more (compared with approximately 32% of mortgages). See *ibid.* Because closed-end loans are many times more common, and typically much larger, than open-end ones, the finance charges would generally be much higher under clause (iii) than under clause (i), providing a reason for Congress to focus more intently on limiting damages in clause (iii). As for the difference between clause (i) and the $1,000 cap in clause (ii): Consumer leases (principally car leases) are obviously a distinctive category and a special damages cap (which differs from clause (iii) as well as from clause (i)) no more demands an explana-

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[3] The medians were, of course, lower than the means: $49,000 for first mortgages, $11,000 for second mortgages, and $15,000 for HELOCs. National Survey 25 (Table 1).

[4] The 1994 survey did not report on the range of amounts owed on HELOCs. In 2001, however, the Census Bureau's Housing Survey began reporting detailed data about HELOCs—in figures presumably comparable to the 1994 data recited above, since the median outstanding balance and median interest rate for HELOCs had not dramatically changed. (The 2001 medians were $17,517 and 8%. See American Housing Survey 152, 154 (Table 3–15).)

tion than does the fact that damages for those leases are tied to monthly payments rather than to finance charges. As JUSTICE STEVENS acknowledges, applying the $1,000 cap to clause (ii) but not clause (i) is a "plausible policy decision." *Ante*, at 65. The Court should not fight the current structure of the statute merely to vindicate the suspicion that Congress actually made—but neglected to explain clearly—a different policy decision.

As the Court noted earlier this year: "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result." *Lamie* v. *United States Trustee*, 540 U. S. 526, 542 (2004) (internal quotation marks and alteration omitted). I would apply the exception only to the clause with which it is associated and affirm the judgment of the Court of Appeals.

Syllabus

CITY OF SAN DIEGO ET AL. *v.* ROE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1669. Decided December 6, 2004

Respondent Roe brought suit alleging, *inter alia*, that his First and Fourteenth Amendment rights to freedom of speech were violated when the city of San Diego (City) terminated his employment as a police officer, for selling police paraphernalia and videotapes of himself engaging in sexually explicit acts. A Federal District Court granted the City's motion to dismiss, and the Ninth Circuit reversed, holding that Roe's conduct fell within the protected category of citizen commentary on matters of public concern.

Held: The City was not barred from terminating Roe. While a government employer may impose restraints on employee speech, the employees have the right to speak on matters of public concern, typically those concerning government policies of interest to the public at large, see *Connick* v. *Myers*, 461 U. S. 138; *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563. And when they speak or write on their own time on a topic unrelated to their employment, the speech can have First Amendment protection, absent a governmental justification "far stronger than mere speculation" for regulating it. *United States* v. *Treasury Employees*, 513 U. S. 454, 465, 475 *(NTEU)*. Roe's case falls outside the protection afforded by *NTEU*. Although his activities took place outside the workplace and purported to be about subjects not related to his employment, the City's police department demonstrated that its legitimate and substantial interests were compromised by his speech, and Roe took deliberate steps to link his videos and other wares to his police work. Instead, the case is governed by *Pickering*, which established a balancing test to reconcile an employee's right to engage in speech and the government employer's right to protect its legitimate concerns, and *Connick*, which set out a threshold test for determining when *Pickering* balancing is merited. Because Roe's expression does not qualify as a matter of public concern as this Court's cases have understood that term, he fails the threshold test and *Pickering*'s balancing test does not come into play.

Certiorari granted; 356 F. 3d 1108, reversed.

PER CURIAM.

The city of San Diego (City), a petitioner here, terminated a police officer, respondent, for selling videotapes he made and for related activity. The tapes showed respondent engaging in sexually explicit acts. Respondent brought suit alleging, among other things, that the termination violated his First and Fourteenth Amendment rights to freedom of speech. The United States District Court for the Southern District of California granted the City's motion to dismiss. The Court of Appeals for the Ninth Circuit reversed.

The petition for a writ of certiorari is granted, and the judgment of the Court of Appeals is reversed.

I

Respondent John Roe, a San Diego police officer, made a video showing himself stripping off a police uniform and masturbating. He sold the video on the adults-only section of eBay, the popular online auction site. His username was "Code3stud@aol.com," a wordplay on a high priority police radio call. 356 F. 3d 1108, 1110 (CA9 2004). The uniform apparently was not the specific uniform worn by the San Diego police, but it was clearly identifiable as a police uniform. Roe also sold custom videos, as well as police equipment, including official uniforms of the San Diego Police Department (SDPD), and various other items such as men's underwear. Roe's eBay user profile identified him as employed in the field of law enforcement.

Roe's supervisor, a police sergeant, discovered Roe's activities when, while on eBay, he came across an official SDPD police uniform for sale offered by an individual with the username "Code3stud@aol.com." He searched for other items Code3stud offered and discovered listings for Roe's videos depicting the objectionable material. Recognizing Roe's picture, the sergeant printed images of certain of Roe's offerings and shared them with others in Roe's chain of command, including a police captain. The captain notified the SDPD's

internal affairs department, which began an investigation. In response to a request by an undercover officer, Roe produced a custom video. It showed Roe, again in police uniform, issuing a traffic citation but revoking it after undoing the uniform and masturbating.

The investigation revealed that Roe's conduct violated specific SDPD policies, including conduct unbecoming of an officer, outside employment, and immoral conduct. When confronted, Roe admitted to selling the videos and police paraphernalia. The SDPD ordered Roe to "cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U. S. Mail, commercial vendors or distributors, or any other medium available to the public." *Id.*, at 1111 (internal quotation marks omitted). Although Roe removed some of the items he had offered for sale, he did not change his seller's profile, which described the first two videos he had produced and listed their prices as well as the prices for custom videos. After discovering Roe's failure to follow its orders, the SDPD—citing Roe for the added violation of disobedience of lawful orders—began termination proceedings. The proceedings resulted in Roe's dismissal from the police force.

Roe brought suit in the District Court pursuant to Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging that the employment termination violated his First Amendment right to free speech. In granting the City's motion to dismiss, the District Court decided that Roe had not demonstrated that selling official police uniforms and producing, marketing, and selling sexually explicit videos for profit qualified as expression relating to a matter of "public concern" under this Court's decision in *Connick* v. *Myers*, 461 U. S. 138 (1983).

In reversing, the Court of Appeals held Roe's conduct fell within the protected category of citizen commentary on matters of public concern. Central to the Court of Appeals' conclusion was that Roe's expression was not an internal work-

place grievance, took place while he was off duty and away from his employer's premises, and was unrelated to his employment. 356 F. 3d, at 1110, 1113–1114.

II

A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. See, *e. g.*, *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 605–606 (1967). On the other hand, a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public. The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment. See *Connick*, *supra*; *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968). Outside of this category, the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification "far stronger than mere speculation" in regulating it. *United States* v. *Treasury Employees*, 513 U. S. 454, 465, 475 (1995) *(NTEU)*. We have little difficulty in concluding that the City was not barred from terminating Roe under either line of cases.

A

In concluding that Roe's activities qualified as a matter of public concern, the Court of Appeals relied heavily on the Court's decision in *NTEU*. 356 F. 3d, at 1117. In *NTEU* it was established that the speech was unrelated to the employment and had no effect on the mission and purpose of the employer. The question was whether the Federal Government could impose certain monetary limitations on outside

earnings from speaking or writing on a class of federal employees. The Court held that, within the particular classification of employment, the Government had shown no justification for the outside salary limitations. The First Amendment right of the employees sufficed to invalidate the restrictions on the outside earnings for such activities. The Court noted that throughout history public employees who undertook to write or to speak in their spare time had made substantial contributions to literature and art, 513 U. S., at 465, and observed that none of the speech at issue "even arguably [had] any adverse impact" on the employer, *ibid.*

The Court of Appeals' reliance on *NTEU* was seriously misplaced. Although Roe's activities took place outside the workplace and purported to be about subjects not related to his employment, the SDPD demonstrated legitimate and substantial interests of its own that were compromised by his speech. Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer. The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as "in the field of law enforcement," and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute. 356 F. 3d, at 1111 (internal quotation marks omitted).

The Court of Appeals noted the City conceded Roe's activities were "unrelated" to his employment. *Id.*, at 1112, n. 4. In the context of the pleadings and arguments, the proper interpretation of the City's statement is simply to underscore the obvious proposition that Roe's speech was not a comment on the workings or functioning of the SDPD. It is quite a different question whether the speech was detrimental to the SDPD. On that score the City's consistent position has been that the speech is contrary to its regulations and harmful to the proper functioning of the police force. The pres-

ent case falls outside the protection afforded in *NTEU.* The authorities that instead control, and which are considered below, are this Court's decisions in *Pickering, supra, Connick,* 461 U. S. 138, and the decisions which follow them.

B

To reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission, the *Pickering* Court adopted a balancing test. It requires a court evaluating restraints on a public employee's speech to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at 568; see also *Connick, supra,* at 142.

Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. See 391 U. S., at 572. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

Pickering did not hold that any and all statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices. See *Connick, supra,* at 143. This concern prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balancing, a public employee's speech must touch on a matter of "pub-

lic concern." 461 U. S., at 143 (internal quotation marks omitted).

In *Connick*, an assistant district attorney, unhappy with her supervisor's decision to transfer her to another division, circulated an intraoffice questionnaire. The document solicited her co-workers' views on, *inter alia*, office transfer policy, office morale, the need for grievance committees, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. See *id.*, at 141.

Finding that—with the exception of the final question—the questionnaire touched not on matters of public concern but on internal workplace grievances, the Court held no *Pickering* balancing was required. 461 U. S., at 141. To conclude otherwise would ignore the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.*, at 143. *Connick* held that a public employee's speech is entitled to *Pickering* balancing only when the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." 461 U. S., at 147.

Although the boundaries of the public concern test are not well defined, *Connick* provides some guidance. It directs courts to examine the "content, form, and context of a given statement, as revealed by the whole record" in assessing whether an employee's speech addresses a matter of public concern. *Id.*, at 146–147. In addition, it notes that the standard for determining whether expression is of public concern is the same standard used to determine whether a common-law action for invasion of privacy is present. *Id.*, at 143, n. 5. That standard is established by our decisions in *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), and *Time, Inc.* v. *Hill*, 385 U. S. 374, 387–388 (1967). These cases make clear that public concern is something that is a

subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to *Pickering* balancing. See *Rankin* v. *McPherson*, 483 U. S. 378 (1987).

Applying these principles to the instant case, there is no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test. He fails the threshold test and *Pickering* balancing does not come into play.

Connick is controlling precedent, but to show why this is not a close case it is instructive to note that even under the view expressed by the dissent in *Connick* from four Members of the Court, the speech here would not come within the definition of a matter of public concern. The dissent in *Connick* would have held that the entirety of the questionnaire circulated by the employee "discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which . . . an elected official charged with managing a vital governmental agency, discharges his responsibilities." 461 U. S., at 163 (opinion of Brennan, J.). No similar purpose could be attributed to the employee's speech in the present case. Roe's activities did nothing to inform the public about any aspect of the SDPD's functioning or operation. Nor were Roe's activities anything like the private remarks at issue in *Rankin*, where one co-worker commented to another co-worker on an item of political news. Roe's expression was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image.

The speech in question was detrimental to the mission and functions of the employer. There is no basis for finding that it was of concern to the community as the Court's cases have

understood that term in the context of restrictions by governmental entities on the speech of their employees.

The judgment of the Court of Appeals is

Reversed.

Syllabus

KANSAS *v.* COLORADO

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 105, Orig. Argued October 4, 2004—Decided December 7, 2004

Kansas and Colorado entered into the Arkansas River Compact (Compact) in 1949, but disagreements over the equitable distribution of the river's upper waters persisted. In 1985, Kansas charged that Colorado had violated the Compact by drilling new irrigation wells that, in Compact Art. IV–D's words, "materially depleted" the river water otherwise available "for use" by Kansas' "water users." Accepting the recommendation set forth in the First Report of the Special Master to find that Colorado had unlawfully depleted the river in violation of Art. IV–D, this Court remanded the case for remedies. *Kansas* v. *Colorado*, 514 U. S. 673, 694. In proposing remedies in his Second and Third Reports, the Master said that Colorado's Compact violation had occurred from 1950 through 1994; recommended that Colorado pay Kansas damages; divided the water losses into six categories, calculating damages somewhat differently for each; and urged that Kansas be awarded prejudgment interest on damages for losses incurred from 1969 through 1994. The Court subsequently adopted these recommendations with one exception: It held that prejudgment interest would run from 1985 (not 1969). *Kansas* v. *Colorado*, 533 U. S. 1, 15–16 *(Kansas III)*. The Master has now filed a Fourth Report setting forth his resolution of certain remaining issues. Kansas takes exception to several of his recommendations.

Held:

1. Kansas' request to appoint a River Master to decide various technical disputes related to decree enforcement is denied. This Court has appointed River Masters to help resolve States' water-related disputes only twice before, *Texas* v. *New Mexico*, 482 U. S. 124, and *New Jersey* v. *New York*, 347 U. S. 995, each time on the Special Master's recommendation, always as a discretionary matter, and only when convinced that such an appointment would significantly aid resolution of further disputes, see *Vermont* v. *New York*, 417 U. S. 270, 275. The Court is not convinced that such an appointment is appropriate here. For one thing, further disputes in this case, while technical, may well require discretionary, policy-oriented decisionmaking directly and importantly related to the underlying legal issues. These potential disputes differ at least in degree from those that the Court has asked River Masters to resolve in past cases. See, *e. g.*, *Texas* v. *New Mexico*, *supra*, at 134, 135–136.

Administration of the present decree will involve the highly complex computer-run Hydrologic-Institutional Model (H-I Model or Model), and resolution of many modeling disputes may well call for highly judgmental determinations of matters that are more importantly related to the parties' basic legal claims. For another thing, the need for a River Master here is diminished by the fact that the parties may be able to resolve future technical disputes through binding arbitration under Compact Art. VII or through less formal dispute-resolution methods like joint consultation with experts, negotiation, and informal mediation. The Special Master recommended all of these alternatives, while opposing appointment of a River Master because it would "simply" make it "easier to continue this litigation." Fourth Report 136. Pp. 92–94.

2. Kansas' exception to the Special Master's prejudgment interest calculation is overruled. The calculation and Kansas' objection grow out of this litigation's special history. The Master initially calculated prejudgment interest on the basis of "considerations of fairness," Third Report 97, dividing the prejudgment period into three temporal subcategories: (1) an Early Period from 1950, when Colorado's unlawful water depletion began, through 1968, when Colorado should first have known about it; (2) a Middle Period from 1969 through 1984; and (3) a Late Period from 1985, when Kansas filed its complaint, through 1994, the last year for which evidence was available at the time of the trial on damages. The Master adjusted damages from *all three* periods for inflation, but he awarded additional prejudgment interest only from 1969 to the judgment date, for a total damages award, including prejudgment interest, of $38 million. *Id.*, at 107. The *Kansas III* Court accepted the Master's equitable approach, 533 U. S., at 11, but applied its own "considerations of fairness" in concluding that "prejudgment interest should begin to accrue" as of 1985, *id.*, at 12–15, and n. 5. On remand, the Master therefore calculated prejudgment interest from 1985 onward on Late Damages alone. Kansas' argument that the Master should have calculated prejudgment interest (from 1985) *on all damages—i. e.*, on Early, Middle, and Late Damages—would make good sense in an ordinary case. But the question here is not about the ordinary case, but rather what *Kansas III*'s prejudgment interest determination meant in that case's special context. For one thing, the Court there did not seek to provide compensation for all of Kansas' lost investment opportunities; rather, it sought to weigh the equities. For another, it was apparent that the Master's earlier determination involved *both* a decision about *when* to begin to calculate interest (1969) and *what* to calculate that interest upon (Middle and Late Damages *only*). Saying nothing about the Master's total exemption of Early Damages, *id.*, at 14, the Court changed the *when* (from 1969 to 1985), but not the methodology for calculating the *what*. In context, the

Court's silence fairly implies acceptance, not rejection, of the Master's underlying methodology, which now yields a post-1985 interest calculation based upon Late Damages *only*. This view is reinforced by the resulting numbers. Were the Court now to accept Kansas' argument, the final damages award would be roughly $53 million (in 2002 dollars), not the $38 million originally calculated by the Master (in 1998 dollars). The Court cannot reconcile that numerical result with its acceptance in *Kansas III* of the Master's equitable approach and with its own equitable determination, which implied a modest adjustment of the $38 million award in *Colorado's* favor, not, as Kansas now seeks, a major adjustment of the award in Kansas' favor. *Ibid.* Pp. 95–99.

3. Kansas' exception to the Special Master's recommendation that the H–I Model be used with a 10-year measurement period to determine Colorado's future Compact compliance is overruled. Kansas seeks, in place of the 10-year period, a 1-year period. Kansas points to Compact Art. V–E(5), which says that there "shall be no allowance or accumulation of credits or debits for or against either State." Kansas argues that a 10-year period averages out oversupply and undersupply during the interim years, with the likely effect of awarding Colorado a "credit" in dry years for oversupply in wet years. Adding that Art. IV–D forbids Colorado to deplete the river water's "availability for use," Kansas says that the 10-year period effectively frees Colorado from the obligation to compensate Kansas for years (within the 10-year period) when overpumping may have made water "unavailable" for Kansas' use. Kansas also notes that the parties and the Master have heretofore used a 1-year measuring period in calculating past damages. The Court is not persuaded by these arguments. The Compact's literal words are not determinative. Its language essentially forbids offsetting debits with "credits," but it does not define the length of time over which a "credit" is measured. *Any* measurement period inevitably averages interim period flows just as it overlooks interim period lack of water "availability." At the same time, practical considerations favor the Master's approach. The Master found that Model results over measurement periods less than 10 years are highly inaccurate, but that the Model functioned with acceptable accuracy over longer periods of time. Moreover, Kansas is unlikely to suffer serious harm through use of a 10-year period because Colorado has developed a river water replacement plan to minimize depletions. Assuming, as Kansas argues, that the Compact's framers expected annual measurement with no carryover from year to year, those framers were likely unaware of the modern difficulties of complex computer modeling and, in any event, would have preferred accurate measurement. The fact that both parties earlier agreed to use annual measurement is not determinative here because

that stipulation was made before the Master fully examined the Model's accuracy. Pp. 99–103.

4. Also overruled is Kansas' exception to the Special Master's recommendation that the final amounts of water replacement plan credits to be applied toward Colorado's Compact obligations be determined by the Colorado Water Court and appeals therefrom. Kansas argues that the Water Court is a state court, that Colorado cannot be its own judge in a dispute with a sister State, *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 28, and that this Court must pass on every essential question, *e. g., Oklahoma* v. *New Mexico*, 501 U. S. 221, 241. Kansas' objection founders, however, upon additional language in the Master's full recommendation—and his attendant analysis—making clear that all replacement credits are subject to Kansas' right to seek relief under this Court's original jurisdiction; that Colorado's replacement plan rules affect the rights, not only of Kansas water users, but also of *Colorado* senior water users; that both groups have similar litigation incentives; and that permitting the Colorado Water Court initially to consider challenges to credit allocations will help prevent inconsistent determinations. The full recommendation will help avoid potential conflict and adequately preserves Kansas' rights to contest any adverse Water Court determination. Pp. 103–104.

5. Kansas' exception to the Special Master's finding that Colorado complied with the Compact between 1997 and 1999 is overruled. Kansas' objection rests on its claim that the Master cannot use an accounting period longer than one year. This Court has already found against Kansas on that matter. P. 104.

6. Kansas' exception to the Special Master's refusal to make recommendations on 15 disputed issues is overruled. As the Master found, there are good reasons not to decide these issues immediately. The issues in the second category, which involves challenges to the accuracy of the figures used to determine whether Colorado depleted the river between 1997 and 1999, are mostly moot. Moreover, the passage of time will produce more accurate resolution of disputes in the first and third categories (and any future second-category disputes). Pp. 104–106.

Kansas' exceptions overruled; Special Master's recommendations accepted; and case recommitted to Special Master.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined, and in which STEVENS and THOMAS, JJ., joined except for Part II. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 106. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 107.

John B. Draper, Special Assistant Attorney General of Kansas, argued the cause for plaintiff. With him on the briefs were *Phill Kline*, Attorney General, *Eric Rucker*, Chief Deputy Attorney General, *David Davies*, Deputy Attorney General, *Harry Kennedy*, Assistant Attorney General, *Leland E. Rolfs*, Special Assistant Attorney General, and *Andrew S. Montgomery*.

David W. Robbins, Special Assistant Attorney General of Colorado, argued the cause for defendant. With him on the brief were *Ken Salazar*, Attorney General, *Carol D. Angel*, First Assistant Attorney General, and *Dennis M. Montgomery*, Special Assistant Attorney General.

James A. Feldman argued the cause for the United States. With him on the brief were former *Solicitor General Olson*, *Assistant Attorney General Sansonetti*, *Deputy Solicitor General Kneedler*, *Jeffrey P. Minear*, and *Patricia Weiss*.

JUSTICE BREYER delivered the opinion of the Court.

We again consider a long-running water dispute between Colorado and Kansas. The water is that of the Arkansas River, once proudly called the "Nile of America." The river originates high in the Rocky Mountains. It runs eastward through Colorado, Kansas, Oklahoma, and Arkansas, before joining the Mississippi near the town of Arkansas Post. For decades, Kansas and Colorado disagreed about the division of its upper waters. See *Kansas* v. *Colorado*, 206 U. S. 46 (1907); *Colorado* v. *Kansas*, 320 U. S. 383 (1943). In 1949, they entered into an interstate compact. See Arkansas River Compact (Compact), 63 Stat. 145 (agreeing to "[e]quitably divide and apportion" the waters (internal quotation marks omitted)). But the disagreements have persisted.

Present proceedings began in 1985, when Kansas charged that Colorado had violated the Compact. Kansas pointed out that Compact Art. IV–D says:

> "This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin

> in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoir, and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works: Provided, that *the waters of the Arkansas River,* as defined in Article III, *shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction.*" *Id.*, at 147 (emphasis added and internal quotation marks omitted).

Kansas submitted that Colorado "development," in particular increases in ground water consumption through new and existing irrigation wells, had "materially depleted" the water otherwise available "for use" by Kansas' "water users." Our appointed Special Master agreed, recommending that we find that Colorado had unlawfully depleted the river in violation of Art. IV–D. 2 First Report of Special Master 336 (hereinafter Report). We accepted the Special Master's recommendations and remanded the case for remedies. *Kansas* v. *Colorado*, 514 U. S. 673, 694 (1995) *(Kansas I)*.

The Special Master set forth proposed remedies in his Second and Third Reports. He said that Colorado had overdepleted more than 400,000 acre-feet of usable river flow from 1950 through 1994. Second Report 112. He recommended that Colorado pay Kansas monetary damages to make up for the depletions. Third Report 119. He divided losses into six categories, calculating damages somewhat differently in each category. See *id.*, at 120. And he recommended that Kansas be awarded prejudgment interest on damages reflecting losses incurred from 1969 through 1994. *Id.*, at 107. We subsequently adopted the Special Master's recommendations with one exception; we held prejudgment interest would run from 1985 (not 1969). *Kansas* v. *Colo-*

rado, 533 U. S. 1, 15–16 (2001) *(Kansas III)*. See *infra*, at 95–97. And we remanded the case. 533 U. S., at 20.

The Master has now filed a Fourth Report setting forth his resolution of certain remaining issues. Kansas takes exception to several of the Fourth Report's recommendations. We overrule Kansas' exceptions and adopt all of the Special Master's recommendations.

I

Kansas asked the Special Master to recommend that we appoint a River Master with authority to decide (within clear error limits) various technical disputes related to decree enforcement. See *Texas* v. *New Mexico*, 482 U. S. 124, 134 (1987) (appointing a River Master to "make the calculations provided for in [a] decree" concerning the Pecos River). The Special Master rejected Kansas' request, recommending instead that "the Court retain continuing jurisdiction in this case for a limited period of time" to permit the Special Master himself to resolve any lingering issues (subject, of course, to this Court's review). Fourth Report 135. Kansas here renews its request for appointment of a River Master.

We recognize that this Court has previously appointed a River Master to help resolve water-related disputes among States. *Texas* v. *New Mexico*, *supra*, at 134–135; *New Jersey* v. *New York*, 347 U. S. 995, 1002–1004 (1954). But it has done so only twice before, each time on recommendation of the Special Master, always as a discretionary matter, and only because it was convinced that such an appointment would significantly aid resolution of further disputes. See *Vermont* v. *New York*, 417 U. S. 270, 275 (1974) *(per curiam)* ("[I]t is a rare case" where we will install a River Master). We are not convinced that such an appointment is appropriate here.

For one thing, further disputes in this case, while technical, may well require discretionary, policy-oriented decision-making directly and importantly related to the underlying legal issues. In this respect, potential disputes in this case

differ at least in degree from those that we have asked River Masters to resolve. Implementation of the Pecos River Decree, for example, involved application of a largely noncontroversial mathematical curve. The curve correlates inflows at various New Mexico River locations with expected outflows so that engineers can estimate, for any given inflow, the amount of water that is required to be available for Texas' use. See *Texas* v. *New Mexico*, 462 U. S. 554, 572–573 (1983); see also *Texas* v. *New Mexico*, 446 U. S. 540 (1980) *(per curiam)*. Lingering disputes between Texas and New Mexico, we thought, would involve not the curve's shape but whether officials had properly measured the flows. 482 U. S., at 134–135. Although these disputes might call for a "degree of judgment," they would often prove capable of mechanical resolution and would usually involve marginal calculation adjustments. *Id.*, at 134; see *id.*, at 135–136; Fourth Report 128 (The Pecos River Master "does not adjudicate the kinds of disputes" potentially at issue here).

Administration of the decree in this case, by contrast, will involve not a simple curve but a highly complex computer model, the Hydrologic-Institutional Model (H–I Model or Model). The H–I Model seeks to determine just what the precise water flows into Kansas *would have been* had Colorado not allowed increased consumption of ground water after 1949. See 2 First Report 231. Modeling disputes—and there have been many—involve not just measurement inputs, but basic assumptions underlying the Model. See, *e. g.*, *Kansas I*, *supra*, at 685–687; 2 First Report 237–240; Fourth Report 123–124. Their resolution may well call for highly judgmental decisionmaking about matters that (compared to the Pecos) are more importantly related to the parties' basic legal claims. See *id.*, at 128.

Moreover, the need for a River Master is diminished by the fact that the parties may find it possible to resolve future technical disputes through arbitration. The interstate compact itself creates an Arkansas River Compact Administra-

tion (Administration) empowered to resolve differences arising under the Compact. Art. VIII, 63 Stat. 149. The Administration consists of three representatives from each State and a representative of the United States acting as chair. Art. VIII–C. Each State has one vote; the United States has no vote. Art. VIII–D. In case of an equally divided vote, the Administration (with the consent of both States) may refer a matter for resolution to the "Representative of the United States or other arbitrator or arbitrators." *Ibid.* (internal quotation marks omitted). The arbitrator's determinations are binding. *Ibid.*

At oral argument, counsel for Kansas suggested a willingness to use arbitration, noting that "in the one case [he was] aware of, Kansas' suggestion of doing an arbitration was rejected by Colorado." Tr. of Oral Arg. 17. Colorado's counsel responded that Colorado had proposed "that binding arbitration be used and has committed itself to participate in that." *Id.*, at 26; see also Reply Brief for Colorado Opposing Exceptions 15. These comments suggest that neither party opposes arbitration, and indeed that Colorado would accept it. Nor have the parties expressed any opposition to the use of other less formal means to resolve disputes, such as joint consultation with experts, negotiation, and informal mediation. See, *e. g.*, *Kansas* v. *Nebraska*, 538 U. S. 720 (2003) (Kansas, Colorado, and Nebraska resolved Republican River dispute by settlement and stipulation); Fourth Report 134 (discussing ongoing "joint efforts" and "cooperation" among the States to resolve lingering disputes over the waters of the Republican River).

The Special Master recommended both binding arbitration and these other less formal methods as alternatives, while opposing appointment of a River Master and observing that such an appointment would "simply" make it "easier to continue this litigation." *Id.*, at 136.

For all of these reasons, we deny Kansas' River Master request.

II

Kansas takes exception to the Special Master's prejudgment interest calculation. The calculation and the objection grow out of the special history of this litigation.

After we initially remanded this case for remedial determinations, see *Kansas I*, 514 U. S. 673, the Special Master found that Colorado's unlawful water depletion had harmed Kansas beginning in 1950 and that Colorado must pay monetary damages reflecting that harm. Kansas asked the Special Master to award prejudgment interest on those damages incurred through 1994. Colorado replied that the Compact—like the common law—did not foresee interest payments in respect to unliquidated claims, particularly where, as here, damages were highly speculative. And even with the best of good will, said Colorado, it still could not have known prior to the filing of the complaint (in 1985) how much it owed Kansas. See Third Report 92–94; *Kansas III*, 533 U. S., at 11–13; Brief for Defendant in *Kansas III*, O. T. 2000, No. 105, Orig., pp. 28–32.

The Special Master resolved the argument by deciding to calculate prejudgment interest on the basis of what he called "'considerations of fairness.'" Third Report 97 (quoting *Board of Comm'rs of Jackson Cty.* v. *United States*, 308 U. S. 343, 352 (1939)). In a kind of Solomonic compromise, he divided the prejudgment period into three temporal subcategories: (1) an Early Period, the period from 1950, when Colorado's unlawful water depletion began, through 1968, when Colorado should first have known about it; (2) a Middle Period, the period from 1969 through 1984; and (3) a Late Period, the period from 1985, when Kansas filed its complaint, through 1994, the last year for which evidence was available at the time of the trial on damages. He adjusted damages from *all three* periods (Early, Middle, and Late) for inflation. But he awarded additional prejudgment interest, reflecting Kansas' loss of use of the money, "only from 1969 to the date of judgment." Third Report 107. Both Kansas and Colo-

rado interpreted his order as awarding interest *only* on Middle and Late Damages (1969–1994), *not* on Early Damages (1950–1968). *Kansas III*, Exception and Brief for Plaintiff Kansas 9; App. to Fourth Report 12–13. The resulting total damages award, including prejudgment interest, came to $38 million. *Ibid.*

On appeal to this Court, Colorado attacked the award of *any* prejudgment interest, while Kansas called for *full* prejudgment interest. We accepted the Special Master's equitable approach. We were unable to conclude that Colorado should have known that prejudgment interest would "automatically" be imposed "in order to achieve full compensation." 533 U. S., at 14. But, we added, Colorado did believe (or should have believed) that we would assess " 'considerations of fairness' " in order to achieve a just and equitable remedy. *Ibid.* Hence "the Special Master acted properly . . . in only awarding as much prejudgment interest as was required by a balancing of the equities." *Ibid.*

The Special Master, we found, properly refused to "award prejudgment interest for any years before either party was aware of the excessive pumping in Colorado." *Id.*, at 15. We then applied our own "considerations of fairness" and concluded that "prejudgment interest should begin to accrue," not as of 1969 (the Special Master's date), but as of 1985. *Id.*, at 14–15. We wrote in an accompanying footnote:

> "JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE THOMAS would not allow any prejudgment interest. . . . JUSTICE KENNEDY and THE CHIEF JUSTICE are of the opinion that prejudgment interest should run from the date of the filing of the complaint [1985]. JUSTICE SOUTER, JUSTICE GINSBURG, JUSTICE BREYER, and [JUSTICE STEVENS] . . . agree with the Special Master's view that interest should run from the time when Colorado knew or should have known that it was violating the Compact [1969]. In order to produce a majority for a

judgment, the four Justices who agree with the Special Master have voted to endorse the position expressed in the text." *Id.*, at 15, n. 5.

On remand, the Special Master, seeking to remain faithful to our determination, calculated prejudgment interest from 1985 onward, and calculated that interest on (post-1984) Late Damages alone, *i. e.*, completely exempting both Early Damages and Middle Damages from prejudgment interest. Kansas now objects to this last-mentioned limitation; it challenges the sum upon which post-1984 interest runs. Kansas says the Special Master should have calculated prejudgment interest (from 1985) *on all damages*, *i. e.*, on Early Damages, Middle Damages, and Late Damages alike. After all, says Kansas, "[p]rejudgment interest serves to compensate for the loss of use of money due as damages . . . thereby achieving full compensation for the injury those damages are intended to redress," *West Virginia* v. *United States*, 479 U. S. 305, 310–311, n. 2 (1987) (citing Comment, Prejudgment Interest: Survey and Suggestion, 77 Nw. U. L. Rev. 192 (1982)). See Exceptions and Brief for Plaintiff 29. Kansas lost the "use of" *all* the "money due as damages," *i. e.*, Early and Middle Damages as well (which were "due" at least by 1985). Why then, asks Kansas, calculate post-1984 interest on only *some* of the damages then due?

Kansas' argument would make good sense in an ordinary case. But the question here is not about the ordinary case, but rather what the *Kansas III* paragraph we quoted above means in context. And the *Kansas III* context is a special one.

For one thing, like the Special Master, we did not seek to provide compensation for all lost investment opportunities; rather, we sought to weigh the equities. For another, it was apparent that the Special Master's earlier determination involved *both* a decision about *when* to begin to calculate interest (1969) and *what* to calculate that interest upon (Middle Damages and Late Damages *only*). Brief for Plaintiff in

Kansas v. *Colorado*, O. T. 2000, No. 105, Orig., pp. 9, 25, n. 8. All damages incurred before his selected date were totally exempt from interest. Kansas contested the *when* by arguing that we should award interest for the entire period. Kansas also contested the *what* by arguing that, even accepting the Special Master's preferred date, interest should run on Early Damages as well as Middle and Late Damages. See *id.*, at 25, n. 8 ("Even if a defendant's good-faith ignorance of its breach were a valid reason to deny prejudgment interest, it would not justify the Special Master's recommendation to deny Kansas compensation for its loss of use of money [reflecting Early Damages] after 1968").

In overruling Kansas' exception and sustaining Colorado's exception, we said nothing about the Special Master's total exemption of Early Damages. 533 U. S., at 14. Thus, we changed the *when* (from 1969 to 1985) in *Kansas III*, but (despite Kansas' argument) we did not change the methodology for calculating the *what*. In context, our silence fairly implies acceptance, not rejection, of the Special Master's underlying methodology. Moving the date forward thus meant moving the exemption period forward as well. And that methodology now yields a post-1985 interest calculation based upon Late Damages *only*.

This view of our prior opinion is reinforced by the resulting numbers. The Special Master's original 1969 date (and methodology) produced a total damages award to Kansas, including prejudgment interest, of about $38 million (in 1998 dollars). Were we to accept Kansas' argument (and calculate post-1984 interest on *all* damages), the final damages award would be roughly $53 million (in 2002 dollars). App. to Fourth Report 12. We cannot reconcile that numerical result with our acceptance in *Kansas III* of the Special Master's equitable approach and with our own equitable determination. That determination implied a modest adjustment of the $38 million award in *Colorado's* favor, not, as Kansas now

seeks, an adjustment of the award in its own favor. App. to Fourth Report 12.

Consequently, we overrule Kansas' objection.

III

Kansas and Colorado have agreed to use a computer model, the H–I Model, to measure Colorado's future Compact compliance. This highly complex set of computer programs determines whether Colorado's post-1949 wells deplete the river of usable water that the Compact makes available for Kansas. It does so by trying to account for almost every Arkansas-River-connected drop of water that arrives in, stays in, or leaves Colorado, whether by way of rain, snow, high mountain streams, well pumping of underground water, evaporation, canal seepage, transmountain imports, reservoir storage, or otherwise. 2 First Report 233–235. With all "switches" turned on, the Model predicts how much river water will leave Colorado for Kansas during a given month. *Id.*, at 234–235. To obtain a figure representing an unlawful depletion (or lawful accretion) under the Compact, the Model subtracts from this figure (the actual flow) a number representing a hypothetical prediction of how much water would have flowed into Kansas had Colorado not dug and operated post-1949 wells. The Model obtains this prediction through a computer rerun with the Model's "post-1949 well" switch turned off. *Ibid.* The final figure is then adjusted to reflect depletions to usable, as opposed to total, flow. App. to Second Report 37.

Not surprisingly, the Model's ability to calculate depletions has proved highly controversial, leading to many Model modifications during this litigation. See, *e. g.*, 2 First Report 236–240 (describing Colorado's objections to the original Model). The Special Master has recommended use of the Model together with a 10-year measurement period to determine the amounts of any future depletions. Fourth Report 139. That is to say, a determination of whether Colorado

owes Kansas water in Year 11 will be made by taking the Model's total result for Years 1–10, for year 12 by the Model's total result for Years 2–11, and so forth. *Id.*, at 117; App. to Fourth Report 86, Exh. 14. Kansas takes exception to the 10-year measurement period.

Kansas seeks a measurement period of one year. In support, Kansas points to Compact Art. V–E(5), 63 Stat. 148, which says that there "shall be no allowance or accumulation of credits or debits for or against either State." (Internal quotation marks omitted.) Kansas argues that a 10-year period averages out oversupply and undersupply during the interim years, with the likely effect of awarding Colorado a "credit" in dry years for oversupply in wet years. Kansas adds that Art. IV–D, 63 Stat. 147, forbids Colorado to deplete the river water's "availability for use." (Internal quotation marks omitted.) Kansas says that the 10-year measurement period in effect frees Colorado from the obligation to compensate Kansas for years (within the 10-year period) when overpumping may have made water "unavailable" for Kansas' use. (Internal quotation marks omitted.) Kansas also notes that the parties and the Special Master have used a 1-year measuring period in this litigation for purposes of calculating past damages. See Exceptions and Brief for Plaintiff 37–40, 43–44.

Like the Special Master, we are not persuaded by Kansas' arguments. The literal words of the Compact are not determinative. The Compact's language essentially forbids offsetting debits with "credits," but it does not define the length of time over which a "credit" is measured. *Any* period of measurement inevitably averages interim period flows just as it overlooks interim period lack of water "availability." Thus annual measurement offsets and overlooks seasonal differences; seasonal measurement, monthly differences; monthly measurement, weekly differences, and so forth.

At the same time, practical considerations favor the Special Master's measurement approach. Model results over measurement periods of less than 10 years are highly inaccurate. The Special Master found, for example, that the current iteration of the Model, if used to project river diversions (including well pumping) during a single year, produces figures that overpredict actual diversions in some years and underpredict them in others by as much as 22%. Fourth Report 111. Similar inaccuracies plague the Model's projection of actual river flows. *Id.*, at 112. If projected diversions and flows deviate substantially in this way from actual measured diversions and flows, 1-year estimates of final *depletions to usable flow*—the figure that determines Kansas' damages—cannot be accurate. *Id.*, at 115 ("I find that the H–I model is not sufficiently accurate on a short-term basis to be used to determine compact compliance on a monthly or annual basis"). But measured over long periods of time, say, the full 540 months between 1950 and 1994, the Model's predicted and observed diversions "matched almost perfectly." *Id.*, at 114. For this reason, the Master concluded that "[o]nly by using longer term averages do the model simulations more closely match historic data." *Id.*, at 115. Thus, the 10-year measurement period is needed to ensure Model accuracy.

Nor is Kansas likely to suffer serious harm through use of a 10-year measuring period. That is because Colorado has developed a water replacement program designed to minimize depletions. See Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the Arkansas River Basin (Use Rules), App. to Fourth Report 36, Exh. 6; Fourth Report 8–13. The program protects both Kansas water users and *senior* Colorado users by insisting that Colorado users with junior rights (and in particular those who obtain water from post-1949 wells) replace the river water that they use. They must either (1) buy replace-

ment water, say, from the Rockies' western slope or (2) buy land irrigated under pre-1949 water rights and remove it from cultivation. *Id.*, at 10–13. In practice, junior users belong to one of three associations that conduct these transactions, reporting the details monthly to the Colorado State Engineer's Office, and receiving replacement "credits," which they divide among their members. *Id.*, at 13.

Were the replacement program and the H–I Model both to work perfectly, the Model's net depletion figure, whether determined each month, each year, or each decade, would be zero (that is, there would be no difference between actual flow and what the flow would have been under precompact conditions). Of course, perfection is impossible; and Kansas claims certain defects in the Use Rules. See *id.*, at 27. But operation of the Rules should help to diminish the real amount of any depletion, thereby limiting any negative effect that a 10-year measurement period might have upon Kansas. See *id.*, at 119–120; see also *id.*, at 32. The 1997–1999 results, showing essentially no aggregate depletion, suggest the water replacement program will have this effect. *Ibid.*

Kansas argues that the Compact's framers expected annual measurement. And they quote a Colorado Commissioner as recognizing that there would be "'no carry-over from year to year,'" see Exceptions and Brief for Plaintiff 39 (quoting Joint Exhibit 3, pp. 14–84). Assuming, *arguendo*, that the framers opposed such carryover, they were likely unaware of the modern difficulties of complex computer modeling. And we believe that those framers, in any event, would have preferred accurate measurement. After all, a "credit" for surplus water that rests upon *in*accurate measurement is not really a credit at all.

Kansas also points out that earlier in this litigation both parties agreed to the use of annual measurement for purposes of calculating past damages. The parties made that stipulation, however, before the Special Master fully exam-

ined the Model's accuracy. In any event, their previous agreements do not govern this determination.

We overrule Kansas' exception.

IV

As we just mentioned, measuring the depletion caused by Colorado's post-1949 wells involves taking account of Colorado's water replacement program, which credits Colorado with non-Arkansas water pumped into the Arkansas and with Arkansas water *not* used because farmers have removed from cultivation lands previously irrigated under pre-1949 water rights. The Special Master has recommended that "the final amounts of Replacement Plan credits to be applied toward Colorado's Compact obligations shall be the amounts determined by the Colorado Water Court, and any appeals therefrom." Fourth Report 138, ¶ 9. Kansas takes exception to this recommendation.

Kansas points out that the Colorado Water Court is a state court. It says that a "'State cannot be its own ultimate judge in a controversy with a sister State,'" Exceptions and Brief for Plaintiff 45–46 (quoting *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 28 (1951)), and that this Court must "'pass upon every question essential'" to resolving the dispute, Exceptions and Brief for Plaintiff 46 (quoting *Oklahoma* v. *New Mexico*, 501 U. S. 221, 241 (1991), in turn quoting *Kentucky* v. *Indiana*, 281 U. S. 163, 176–177 (1930)). Kansas believes that the Special Master's recommendation violates these well-established principles.

Kansas' objection founders, however, upon additional language in the Master's full recommendation. The recommendation adds:

> "This is not to say, however, that the Colorado Water Courts are empowered to make a final determination on any matter essential to compact compliance at the Stateline, or that Colorado's reliance on such Water Court actions will necessarily satisfy its compact obligations. . . .

> All replacement credits, no matter how determined, are subject to the right of Kansas to seek relief under the Court's original jurisdiction [as set forth in] Section VIII." Fourth Report 138–139, ¶ 9.

In the cross-referenced Section VIII, the Special Master makes clear that Colorado's replacement plan rules affect the rights, not only of Kansas water users, but also of *Colorado* senior water users; that both groups of water users have similar litigation incentives; and that permitting the Colorado Water Court initially to consider challenges to credit allocations will help prevent inconsistent determinations. *Id.*, at 93–95.

In our view, the Special Master's full recommendation will help to avoid the potential conflict he mentioned. It also adequately preserves Kansas' rights to contest any adverse Water Court determination. We overrule Kansas' exception.

V

The Special Master found that Colorado complied with the Compact for the period 1997–1999. Kansas takes exception on the ground that the Special Master used a measurement period "greater than one year." Exceptions and Brief for Plaintiff 47. Kansas concedes that its objection rests upon its claim that the Special Master cannot use "an accounting period longer than one year." *Ibid.* Having found against Kansas on that matter, *supra*, at 100–103, we must overrule this exception.

VI

At the end of its brief, Kansas lists 15 disputed issues that the Special Master has not yet decided. It groups them into three categories:

> 1. "Disputed H–I Model Calibration Issues" ("[c]alibration procedures, parameters and criteria," "[c]anal capacities," "altered diversion records," "statistical outliers," "Sisson-Stubbs water right" representation);

2. "Disputed 1997–1999 Accounting Issues" ("[d]ry-up acreage," "Sisson-Stubbs credit," "winter water book-overs" credit);

3. "Disputed Future Compliance Issues" ("[d]ry-up acreage monitoring," "[d]ry-up credits" and external source "return flow obligations," credit beyond "precompact uses," "[s]pecial waters monitoring," winter water release credit timing, "[o]ffset [a]ccount" accounting procedures, "consumptive use credit and return flow obligations"). Exceptions and Brief for Plaintiff 48–49.

Kansas takes exception to the Special Master's refusal to make recommendations on these issues now. It points out that we cannot leave unanswered important questions "'essential'" to our "'determination of a controversy'" between the States. *Id.*, at 49 (quoting *Oklahoma* v. *New Mexico*, *supra*, at 241). And Kansas asks us to require the Special Master to decide them.

As the Special Master found, however, there are good reasons not to decide these issues immediately. There is no need to resolve most of the issues in the second category. They involve challenges to the accuracy of the figures used to determine whether Colorado depleted the river between 1997 and 1999. The Special Master concluded that Colorado was in compliance during 1997–1999, in the process relying upon Kansas' own figures. Fourth Report 30–31. As far as we can tell from the briefs, these issues are mostly moot.

The passage of time will produce more accurate resolution of disputes in the first and third categories (and any of those in the second that arise again in the future). The parties will learn more about matters relevant to their resolution, namely, the H–I Model's strengths, weaknesses, and methods of monitoring and measurement. That is why the Special Master recommended that we retain jurisdiction over this case and permit him to take up lingering issues at a future

date. *Id.*, at 135–136, 139. We accept that recommendation and overrule Kansas' objection.

The Special Master also recommended that experts for the two parties confer, *e. g.*, *id.*, at 91–92, and he expressed the hope that expert discussion, negotiation, and, if necessary, binding arbitration would lead to resolution of any remaining disputes. *Id.*, at 135–136. We express that hope as well.

VII

For these reasons, we overrule all Kansas' exceptions. We accept the Special Master's recommendations and recommit the case to the Special Master for preparation of a decree consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I join the Court's opinion with the exception of Part II, which concerns whether prejudgment interest should begin accruing in 1985 only on damages thereafter arising (post-1985 damages) or also on damages then owing (pre-1985 damages). As JUSTICE O'CONNOR explained in *Kansas* v. *Colorado*, 533 U. S. 1 (2001) *(Kansas III)*, neither the Arkansas River Compact itself nor the common law at the time of the compact's formation allows Kansas to recover any prejudgment interest. See *id.*, at 21–25 (opinion, joined by SCALIA and THOMAS, JJ., dissenting in part). The Court did not adopt that view in *Kansas III*, but neither did it adopt the now-familiar rule that Kansas should be made whole with an award of prejudgment interest spanning the duration of Colorado's breach, from 1950 to the present. See, *e. g.*, *Milwaukee* v. *Cement Div., National Gypsum Co.*, 515 U. S. 189, 195–196, and n. 7 (1995); *West Virginia* v. *United States*, 479 U. S. 305, 310–311, n. 2 (1987).

The Court instead crafted what it viewed as an equitable compromise, designed to apply *sui generis* to these States

and their particular dispute, in which prejudgment interest would begin to accrue in 1985. See *Kansas III*, *supra*, at 14–16. Its compromise left open the door to the present litigation, for saying *when* prejudgment interest began to accrue did not answer *on what* the interest was accruing. The Court therefore must again decide what is too little or too much compensation for Colorado's depletion of the Arkansas. That weighing is as unnecessary now as it was before. Kansas is not entitled to prejudgment interest, and its exception seeks only to compound the windfall it received in *Kansas III*. I therefore agree with the Court that Kansas' second exception to the Special Master's Report should be overruled.

JUSTICE STEVENS, concurring in part and dissenting in part.

With the exception of Part II, I join the Court's opinion. In dissenting from Part II, I adhere to the views that we expressed in *Kansas* v. *Colorado*, 533 U. S. 1, 13–16 (2001) *(Kansas III)*.[1] In *Kansas III*, in a compromise that was required in order to issue a judgment of the Court, we accepted the views of THE CHIEF JUSTICE and JUSTICE KENNEDY that prejudgment interest should run from 1985, the date the complaint was filed. *Ibid.* Like today's majority, I adhere to the judgment reflecting that compromise. Unlike the majority, however, I believe that prejudgment interest should run, starting in 1985, on all damages that accrued after Colorado "knew or should have known that it was violating" its compact with Kansas—*i. e.*, from 1969. *Id.*, at 15, n. 5. Such a result best respects the reasoning behind our conclusion in *Kansas III* that prejudgment interest is an appropriate component of the award of damages.

In *Kansas III*, recognizing that a monetary award does not fully compensate for an injury unless it includes an inter-

[1] *Kansas III* was predated by *Kansas* v. *Colorado*, 514 U. S. 673 (1995), and *Kansas* v. *Colorado*, 522 U. S. 1073 (1998).

est component, we affirmed the Special Master's determination that the unliquidated nature of Kansas' claim did not by itself bar an award of prejudgment interest. *Id.*, at 14. Nevertheless, equitable concerns persuaded a majority of the Court to overrule the Special Master's determination that prejudgment interest should begin to run in 1969, the date on which Colorado first knew, or should have known, that it was violating the Arkansas River Compact. Although we did not explicitly discuss the point in our opinion, we also agreed with the Special Master's decision to exclude from the principal amount on which interest would run any damages that had accrued prior to 1969.[2]

The methodology that led to that conclusion was the Master's appraisal of the equities—in his judgment, interest should not be imposed on the portion of the damages award that was attributable to relatively innocent conduct that occurred before 1969. See Report 106–107 ("The general lack of knowledge in the early years about pumping in Colorado and its impacts along the Arkansas River served to protect Kansas during the liability phase of the case against a claim of laches. The same degree of fairness, I believe, should now relieve Colorado of the obligation to pay full interest rates on damages from depletions during 1950–68

[2] Kansas had objected to the Master's refusal to award interest on all damages accruing after 1950. See Brief for Plaintiff in *Kansas III*, O. T. 2000, No. 105, Orig., p. 25, n. 8. Although we did not discuss Kansas' exception to the Special Master's determination regarding the total amount of damages on which interest would run, we overruled the objection and thereby approved the Master's selection of the period after 1968 as the appropriate measure of damages on which interest should be paid. See *Kansas III*, 533 U. S. 1, 14 (2001); see also Third Report of Special Master 106–107 (hereinafter Report) (explaining that Colorado's awareness of its breach was central to the determination that interest should run on post-1968 damages). Today, the Court explains why it would be inequitable to give Kansas the relief that would be the equivalent of sustaining an objection that we overruled three years ago, but does not explain why we should not accept the Special Master's original determination that all post-1968 damages should bear interest.

period . . ."). But the Master did find that Colorado was required to pay interest on damages that occurred between 1969 and 1985. See *ibid.*; see also Brief for United States in Opposition to the Exceptions of Kansas and Colorado in *Kansas III*, O. T. 2000, No. 105, Orig., p. 27 ("For the period from 1969 to the date of judgment, the Master recommended that Kansas be awarded prejudgment interest"). Our opinion did not reject that portion of his judgment, and did not contain any suggestion that he had erred in that respect. See 533 U. S., at 12, 14. The happenstance that we selected, as a compromise, the date the complaint was filed as the date on which interest should begin to accrue should have no bearing on the principal amount of damages that gave rise to the interest obligation. Thus, I believe that the Special Master's Fourth Report erred in its conclusion that we meant to limit the principal amount of damages to those that occurred after 1985.

Surely if this were an ordinary tort case involving a single harm-causing event, an award of prejudgment interest would apply to the entire damages recovery, not just to the portion that resulted from events occurring after interest began to accrue. See *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163, 168 (1933). Indeed, were this an ordinary case, we would no doubt have awarded prejudgment interest in the entire amount that Kansas requested in *Kansas III*. This, however, is a unique case in which unusual equities necessitated a compromise designed to resolve a dispute between two States. Thus, I agree with the majority that the Special Master was correct in rejecting Kansas' argument that the principal on which interest should run should be "the nominal damages occurring from 1950 through 1984." App. to Fourth Report 15.

However, the fact that Kansas' request represents too large a measure of damages does not convince me that Kansas is entitled to *no* interest for damages prior to 1985. Nothing in our *Kansas III* opinion compels such a result.

In my view, the proper measure of damages on which Colorado owes Kansas interest is the entire amount attributable to the time that Colorado knew, or should have known, that it was violating the compact. That date is 1969—the date that the Special Master initially chose and that we implicitly accepted as appropriate in *Kansas III*. Choosing 1969 as the initial date for the damages period not only has the benefit of respecting our affirmation of the methodology in the Special Master's Third Report, it also results in a total damages sum that is less than the $38 million the Special Master originally awarded.

Accordingly, I would sustain Kansas' second objection to the Special Master's Report, but only insofar as it applies to post-1968 damages.

Syllabus

KP PERMANENT MAKE-UP, INC. *v.* LASTING IMPRESSION I, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–409. Argued October 5, 2004—Decided December 8, 2004

Petitioner KP Permanent Make-Up, Inc., and respondents (collectively Lasting) all use the term "micro color" (as one word or two, singular or plural) in marketing permanent cosmetic makeup. The Court accepts KP's claim that it has used the single-word version since 1990 or 1991. In 1992, Lasting registered a trademark that included the words "Micro Colors" under 15 U. S. C. § 1051, and, in 1999, the registration became incontestable, § 1065. When Lasting demanded that KP stop using the word "microcolor," KP sued for declaratory relief. Lasting counterclaimed, alleging, *inter alia*, that KP had infringed Lasting's trademark. KP responded by asserting the statutory affirmative defense of fair use, § 1115(b)(4). Finding that Lasting conceded that KP used "microcolor" only to describe its goods and not as a mark, the District Court held that KP was acting fairly and in good faith because KP undisputedly had employed the term continuously from before Lasting adopted its mark. Without enquiring whether the practice was likely to cause consumer confusion, the court concluded that KP had made out its affirmative defense under § 1115(b)(4) and entered summary judgment for KP on Lasting's infringement claim. Reversing, the Ninth Circuit ruled that the District Court erred in addressing the fair use defense without delving into the matter of possible consumer confusion about the origin of KP's goods. The court did not pointedly address the burden of proof, but appears to have placed it on KP to show the absence of such confusion.

Held: A party raising the statutory affirmative defense of fair use to a claim of trademark infringement does not have a burden to negate any likelihood that the practice complained of will confuse consumers about the origin of the goods or services affected. Pp. 117–124.

(a) Although § 1115(b) makes an incontestable registration "conclusive evidence . . . of the registrant's exclusive right to use the . . . mark," it also subjects a plaintiff's success to "proof of infringement as defined in section 1114." Section 1114(1) in turn requires a showing that the defendant's actual practice is "likely to cause confusion, or to cause mistake, or to deceive" consumers about the origin of the goods or services in question, see, *e. g.*, *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S.

763, 780. Thus, a plaintiff claiming infringement of an incontestable mark must show likelihood of consumer confusion as part of the prima facie case. This plaintiff's burden must be kept in mind when reading § 1115(b)(4), which provides the fair use defense to a party whose "use of the . . . term . . . charged to be an infringement is a use, otherwise than as a mark, . . . of a term . . . which is descriptive of and used fairly and in good faith only to describe the goods or services." It is evident (1) that § 1115(b) places a burden of proving likelihood of confusion (that is, infringement) on the party charging infringement even when relying on an incontestable registration, and (2) that Congress said nothing about likelihood of confusion in setting out the elements of the fair use defense in § 1115(b)(4). It therefore takes a long stretch to claim that a fair use defense entails any burden to negate confusion. It is not plausible that Congress would have used § 1114's phrase "likely to cause confusion, or to cause mistake, or to deceive" to describe the requirement that a markholder show likelihood of consumer confusion, but would have relied on § 1115(b)(4)'s phrase "used fairly" to give a defendant the burden to negate confusion. See, *e. g., Russello* v. *United States*, 464 U. S. 16, 23. Congress's failure to say anything about a defendant's burden on this point was almost certainly not an oversight, since the House Trademarks Subcommittee refused to forward a proposal expressly providing likelihood to deceive the public as an element of the fair use defense. Lasting argues unpersuasively that "used fairly" in § 1115(b)(4) is an oblique incorporation of a likelihood-of-confusion test developed in the common law of unfair competition. While cases such as *Baglin* v. *Cusenier Co.*, 221 U. S. 580, are consistent with taking account of the likelihood of consumer confusion as one consideration in deciding whether a use is fair, they cannot be read to make an assessment of confusion alone dispositive or provide that the defense has a burden to negate it entirely. Finally, a look at the typical course of litigation in an infringement action points up the incoherence of placing a burden to show nonconfusion on a defendant. If a plaintiff succeeds in making out a prima facie case, including the element of likelihood of confusion, the defendant may offer rebutting evidence to undercut the force of the plaintiff's evidence on this element, or raise an affirmative defense to bar relief even if the prima facie case is sound, or do both. It would make no sense to give the defendant a defense of showing affirmatively that the plaintiff cannot succeed in proving some element (like confusion); all the defendant needs to do is to leave the factfinder unpersuaded that the plaintiff has carried its own burden on that point. Nor would it make sense to provide an affirmative defense of no confusion plus good faith, when merely rebutting the plaintiff's

case on confusion would entitle the defendant to judgment, good faith or not. Pp. 117–121.

(b) Since the burden of proving likelihood of confusion rests with the plaintiff, and the fair use defendant has no freestanding need to show confusion unlikely, the Court recognizes (contrary to the Ninth Circuit's view) that some possibility of consumer confusion is compatible with fair use. It would be improvident to go further here, for deciding anything more would take the Court beyond the Ninth Circuit's consideration of the subject. Because the Court does not rule out the pertinence of the degree of consumer confusion under the fair use defense, it does not pass upon the Government's position that § 1115(b)(4)'s "used fairly" requirement demands only that the descriptive term describe the goods accurately. Accuracy has to be a consideration in assessing fair use, but the proceedings below have raised no occasion to evaluate other concerns that courts might pick as relevant—*e. g.*, commercial justification and the strength of the plaintiff's mark—as to which the door is not closed. Pp. 121–123.

(c) This Court reads the Ninth Circuit as erroneously requiring KP to shoulder a burden on the confusion issue. P. 124.

328 F. 3d 1061, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, THOMAS, and GINSBURG, JJ., joined, in which SCALIA, J., joined as to all but footnotes 4 and 5, and in which BREYER, J., joined as to all but footnote 6.

Michael Machat argued the cause and filed briefs for petitioner.

Patricia A. Millett argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were former *Solicitor General Olson*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Hungar*, *Anthony J. Steinmeyer*, *Anthony A. Yang*, *John M. Whealan*, *Cynthia C. Lynch*, and *Nancy C. Slutter*.

Beth S. Brinkmann argued the cause for respondents. With her on the brief were *Charles C. H. Wu*, *Mark H. Cheung*, *Drew S. Days III*, *Edward W. Gray, Jr.*, *Seth M. Galanter*, and *J. Thomas McCarthy*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Intellectual Property Law Association by *Michael P. Boudett*, *Denise W. DeFranco*, and *Rick D. Nydegger*; for the Private Label Manufacturers

JUSTICE SOUTER delivered the opinion of the Court.*

The question here is whether a party raising the statutory affirmative defense of fair use to a claim of trademark infringement, 15 U. S. C. § 1115(b)(4), has a burden to negate any likelihood that the practice complained of will confuse consumers about the origin of the goods or services affected. We hold it does not.

I

Each party to this case sells permanent makeup, a mixture of pigment and liquid for injection under the skin to camouflage injuries and modify nature's dispensations, and each has used some version of the term "micro color" (as one word or two, singular or plural) in marketing and selling its product. Petitioner KP Permanent Make-Up, Inc., claims to have used the single-word version since 1990 or 1991 on advertising flyers and since 1991 on pigment bottles. Respondents Lasting Impression I, Inc., and its licensee, MCN International, Inc. (Lasting, for simplicity), deny that KP began using the term that early, but we accept KP's allegation as true for present purposes; the District and Appeals Courts took it to be so, and the disputed facts do not matter to our resolution of the issue.[1] In 1992, Lasting applied to the United States Patent and Trademark Office (PTO) under 15 U. S. C. § 1051 for registration of a trademark consisting of

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Association by *Arthur M. Handler;* and for Malla Pollack et al. by *Ms. Pollack, pro se.*

Robert A. Long, Jr., filed a brief for the Society of Permanent Cosmetic Professionals et al. as *amici curiae* urging affirmance.

William D. Raman, Theodore H. Davis, Jr., and *Olivia Maria Baratta* filed a brief for the International Trademark Association as *amicus curiae.*

*JUSTICE SCALIA joins all but footnotes 4 and 5 of this opinion. JUSTICE BREYER joins all but footnote 6.

[1] We note that in its brief to the Court of Appeals, Lasting appears to have conceded KP's use of "microcolor" in the early 1990's. Appellants' Opening Brief in No. 01–56055 (CA9), p. 8.

the words "Micro Colors" in white letters separated by a green bar within a black square.[2] The PTO registered the mark to Lasting in 1993, and in 1999 the registration became incontestable. § 1065.

It was also in 1999 that KP produced a 10-page advertising brochure using "microcolor" in a large, stylized typeface, provoking Lasting to demand that KP stop using the term. Instead, KP sued Lasting in the Central District of California, seeking, on more than one ground, a declaratory judgment that its language infringed no such exclusive right as Lasting claimed.[3] Lasting counterclaimed, alleging, among other things, that KP had infringed Lasting's "Micro Colors" trademark.

KP sought summary judgment on the infringement counterclaim, based on the statutory affirmative defense of fair use, 15 U. S. C. § 1115(b)(4). After finding that Lasting had conceded that KP used the term only to describe its goods and not as a mark, the District Court held that KP was acting fairly and in good faith because undisputed facts showed that KP had employed the term "microcolor" continuously from a time before Lasting adopted the two-word, plural variant as a mark. Without enquiring whether the practice was likely to cause confusion, the court concluded that KP had made out its affirmative defense under § 1115(b)(4) and

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[2] A trademark may be "any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured and sold by others and to indicate the source of the goods, even if that source is unknown." 15 U. S. C. § 1127.

[3] We summarize the proceedings in this litigation only as they are relevant to the question before us. The District Court's findings as to the generic or descriptive nature of the term "micro color" and any secondary meaning that term has acquired by any of the parties, see Case No. SA CV 00-276-GLT (EEx) (CD Cal., May 16, 2001), pp. 3–5, 5–8, are not before us. Nor are the Court of Appeals's holdings on these issues. See 328 F. 3d 1061, 1068–1071 (CA9 2003). Nor do we address the Court of Appeals's discussion of "nominative fair use." *Id.*, at 1071–1072.

entered summary judgment for KP on Lasting's infringement claim. See Case No. SA CV 00–276–GLT (EEx) (May 16, 2001), pp. 8–9, App. to Pet. for Cert. 29a–30a.

On appeal, 328 F. 3d 1061 (2003), the Court of Appeals for the Ninth Circuit thought it was error for the District Court to have addressed the fair use defense without delving into the matter of possible confusion on the part of consumers about the origin of KP's goods. The reviewing court took the view that no use could be recognized as fair where any consumer confusion was probable, and although the court did not pointedly address the burden of proof, it appears to have placed it on KP to show absence of consumer confusion. *Id.*, at 1072 ("Therefore, KP can only benefit from the fair use defense if there is no likelihood of confusion between KP's use of the term 'micro color' and Lasting's mark"). Since it found there were disputed material facts relevant under the Circuit's eight-factor test for assessing the likelihood of confusion, it reversed the summary judgment and remanded the case.

We granted KP's petition for certiorari, 540 U. S. 1099 (2004), to address a disagreement among the Courts of Appeals on the significance of likely confusion for a fair use defense to a trademark infringement claim, and the obligation of a party defending on that ground to show that its use is unlikely to cause consumer confusion. Compare 328 F. 3d, at 1072 (likelihood of confusion bars the fair use defense); *PACCAR Inc.* v. *TeleScan Technologies, L. L. C.*, 319 F. 3d 243, 256 (CA6 2003) ("[A] finding of a likelihood of confusion forecloses a fair use defense"); and *Zatarains, Inc.* v. *Oak Grove Smokehouse, Inc.*, 698 F. 2d 786, 796 (CA5 1983) (alleged infringers were free to use words contained in a trademark "in their ordinary, descriptive sense, so long as such use [did] not tend to confuse customers as to the source of the goods"), with *Cosmetically Sealed Industries, Inc.* v. *Chesebrough-Pond's USA Co.*, 125 F. 3d 28, 30–31 (CA2 1997) (the fair use defense may succeed even if there is likelihood

of confusion); *Shakespeare Co.* v. *Silstar Corp. of Am., Inc.*, 110 F. 3d 234, 243 (CA4 1997) ("[A] determination of likely confusion [does not] preclud[e] considering the fairness of use"); *Sunmark, Inc.* v. *Ocean Spray Cranberries, Inc.*, 64 F. 3d 1055, 1059 (CA7 1995) (finding that likelihood of confusion did not preclude the fair use defense). We now vacate the judgment of the Court of Appeals.

II

A

The Trademark Act of 1946, known for its principal proponent as the Lanham Act, 60 Stat. 427, as amended, 15 U. S. C. § 1051 *et seq.*, provides the user of a trade or service mark with the opportunity to register it with the PTO, §§ 1051, 1053. If the registrant then satisfies further conditions including continuous use for five consecutive years, "the right . . . to use such registered mark in commerce" to designate the origin of the goods specified in the registration "shall be incontestable" outside certain listed exceptions. § 1065.

The holder of a registered mark (incontestable or not) has a civil action against anyone employing an imitation of it in commerce when "such use is likely to cause confusion, or to cause mistake, or to deceive." § 1114(1)(a). Although an incontestable registration is "conclusive evidence . . . of the registrant's exclusive right to use the . . . mark in commerce," § 1115(b), the plaintiff's success is still subject to "proof of infringement as defined in section 1114," *ibid.* And that, as just noted, requires a showing that the defendant's actual practice is likely to produce confusion in the minds of consumers about the origin of the goods or services in question. See *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S. 763, 780 (1992) (STEVENS, J., concurring); *Lone Star Steakhouse & Saloon, Inc.* v. *Alpha of Virginia, Inc.*, 43 F. 3d 922, 935 (CA4 1995); Restatement (Third) of Unfair Competition § 21, Comment *a* (1995) (hereinafter Restate-

ment). This plaintiff's burden has to be kept in mind when reading the relevant portion of the further provision for an affirmative defense of fair use, available to a party whose

> "use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, . . . of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin . . . ." § 1115(b)(4).

Two points are evident. Section 1115(b) places a burden of proving likelihood of confusion (that is, infringement) on the party charging infringement even when relying on an incontestable registration. And Congress said nothing about likelihood of confusion in setting out the elements of the fair use defense in § 1115(b)(4).

Starting from these textual fixed points, it takes a long stretch to claim that a defense of fair use entails any burden to negate confusion. It is just not plausible that Congress would have used the descriptive phrase "likely to cause confusion, or to cause mistake, or to deceive" in § 1114 to describe the requirement that a markholder show likelihood of consumer confusion, but would have relied on the phrase "used fairly" in § 1115(b)(4) in a fit of terse drafting meant to place a defendant under a burden to negate confusion. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (quoting *United States* v. *Wong Kim Bo*, 472 F. 2d 720, 722 (CA5 1972); alteration in original).[4]

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[4] Not only that, but the failure to say anything about a defendant's burden on this point was almost certainly not an oversight, not after the House Subcommittee on Trademarks declined to forward a proposal to provide expressly as an element of the defense that a descriptive use be

Nor do we find much force in Lasting's suggestion that "used fairly" in § 1115(b)(4) is an oblique incorporation of a likelihood-of-confusion test developed in the common law of unfair competition. Lasting is certainly correct that some unfair competition cases would stress that use of a term by another in conducting its trade went too far in sowing confusion, and would either enjoin the use or order the defendant to include a disclaimer. See, *e. g.*, *Baglin* v. *Cusenier Co.*, 221 U. S. 580, 602 (1911) ("[W]e are unable to escape the conclusion that such use, in the manner shown, was to serve the purpose of simulation . . ."); *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554, 559 (1908) ("[T]he rights of the two parties have been reconciled by allowing the use, provided that an explanation is attached"). But the common law of unfair competition also tolerated some degree of confusion from a descriptive use of words contained in another person's trademark. See, *e. g.*, *William R. Warner & Co.* v. *Eli Lilly & Co.*, 265 U. S. 526, 528 (1924) (as to plaintiff's trademark claim, "[t]he use of a similar name by another to truthfully describe his own product does not constitute a legal or moral wrong, even if its effect be to cause the public to mistake the origin or ownership of the product"); *Canal Co.* v. *Clark*, 13 Wall. 311, 327 (1872) ("Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth"); see also 3 L. Altman, Callmann on Unfair Competition, Trademarks and Monopolies § 18:2, pp. 18–8 to 18–9, n. 1 (4th ed. 2004) (citing cases). While these cases are consistent with taking account of the likelihood of consumer confusion as one consideration in deciding whether a use is fair, see Part II–B, *infra*, they do not stand for the proposition that an assessment of

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"'[un]likely to deceive the public.'" Hearings on H. R. 102 et al. before the Subcommittee on Trade-Marks of the House Committee on Patents, 77th Cong., 1st Sess., 167–168 (1941) (hereinafter Hearings) (testimony of Prof. Milton Handler).

confusion alone may be dispositive. Certainly one cannot get out of them any defense burden to negate it entirely.

Finally, a look at the typical course of litigation in an infringement action points up the incoherence of placing a burden to show nonconfusion on a defendant. If a plaintiff succeeds in making out a prima facie case of trademark infringement, including the element of likelihood of consumer confusion, the defendant may offer rebutting evidence to undercut the force of the plaintiff's evidence on this (or any) element, or raise an affirmative defense to bar relief even if the prima facie case is sound, or do both. But it would make no sense to give the defendant a defense of showing affirmatively that the plaintiff cannot succeed in proving some element (like confusion); all the defendant needs to do is to leave the factfinder unpersuaded that the plaintiff has carried its own burden on that point. A defendant has no need of a court's true belief when agnosticism will do. Put another way, it is only when a plaintiff has shown likely confusion by a preponderance of the evidence that a defendant could have any need of an affirmative defense, but under Lasting's theory the defense would be foreclosed in such a case. "[I]t defies logic to argue that a defense may not be asserted in the only situation where it even becomes relevant." *Shakespeare Co.* v. *Silstar Corp.*, 110 F. 3d, at 243. Nor would it make sense to provide an affirmative defense of no confusion plus good faith, when merely rebutting the plaintiff's case on confusion would entitle the defendant to judgment, good faith or not.

Lasting tries to extenuate the anomaly of this conception of the affirmative defense by arguing that the oddity reflects the "vestigial" character of the fair use defense as a historical matter. Tr. of Oral Arg. 39. Lasting argues that, because it was only in 1988 that Congress added the express provision that an incontestable markholder's right to exclude is "subject to proof of infringement," Trademark Law Revision Act of 1988, §128(b)(1), 102 Stat. 3944, there was no

requirement prior to 1988 that a markholder prove likelihood of confusion. Before 1988, the argument goes, it was sensible to get at the issue of likely confusion by requiring a defendant to prove its absence when defending on the ground of fair use. When the 1988 Act saddled the markholder with the obligation to prove confusion likely, § 1115(b), the revision simply failed to relieve the fair use defendant of the suddenly strange burden to prove absence of the very confusion that a plaintiff had a new burden to show in the first place.

But the explanation does not work. It is not merely that it would be highly suspect in leaving the claimed element of § 1115(b)(4) redundant and pointless. *Hibbs* v. *Winn*, 542 U. S. 88, 101 (2004) (noting "rule against superfluities" in statutory construction). The main problem of the argument is its false premise: Lasting's assumption that holders of incontestable marks had no need to prove likelihood of confusion prior to 1988 is wrong. See, *e. g.*, *Beer Nuts, Inc.* v. *Clover Club Foods Co.*, 805 F. 2d 920, 924–925 (CA10 1986) (requiring proof of likelihood of confusion in action by holder of incontestable mark); *United States Jaycees* v. *Philadelphia Jaycees*, 639 F. 2d 134, 137, n. 3 (CA3 1981) ("[I]ncontestability [does not] mak[e] unnecessary a showing of likelihood of confusion . . ."); 5 J. McCarthy, Trademarks and Unfair Competition § 32:154, p. 32–247 (4th ed. 2004) ("Before the 1988 Trademark Law Revision Act, the majority of courts held that while incontestability grants a conclusive presumption of the 'exclusive right to use' the registered mark, this did not relieve the registrant of proving likelihood of confusion").

B

Since the burden of proving likelihood of confusion rests with the plaintiff, and the fair use defendant has no free-standing need to show confusion unlikely, it follows (contrary to the Court of Appeals's view) that some possibility of consumer confusion must be compatible with fair use, and so it

is. The common law's tolerance of a certain degree of confusion on the part of consumers followed from the very fact that in cases like this one an originally descriptive term was selected to be used as a mark, not to mention the undesirability of allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first. *Canal Co.* v. *Clark*, 13 Wall., at 323–324, 327. The Lanham Act adopts a similar leniency, there being no indication that the statute was meant to deprive commercial speakers of the ordinary utility of descriptive words. "If any confusion results, that is a risk the plaintiff accepted when it decided to identify its product with a mark that uses a well known descriptive phrase." *Cosmetically Sealed Industries, Inc.* v. *Chesebrough-Pond's USA Co.*, 125 F. 3d, at 30. See also *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 201 (1985) (noting safeguards in Lanham Act to prevent commercial monopolization of language); *Car-Freshner Corp.* v. *S. C. Johnson & Son, Inc.*, 70 F. 3d 267, 269 (CA2 1995) (noting importance of "protect[ing] the right of society at large to use words or images in their primary descriptive sense").[5] This right to describe is the reason that descriptive terms qualify for registration as trademarks only after taking on secondary meaning as "distinctive of the applicant's goods," 15 U. S. C. § 1052(f), with the registrant getting an exclusive right not in the original, descriptive sense, but only in the secondary one associated with the markholder's goods, 2 McCarthy, *supra*, § 11:45, p. 11–90 ("The only aspect of the mark which is given legal protection is that penumbra or fringe of secondary meaning which surrounds the old descriptive word").

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[5] See also Hearings 72 (testimony of Wallace Martin, Chairman, American Bar Association Committee on Trade-Mark Legislation) ("Everybody has got a right to the use of the English language and has got a right to assume that nobody is going to take that English language away from him").

While we thus recognize that mere risk of confusion will not rule out fair use, we think it would be improvident to go further in this case, for deciding anything more would take us beyond the Ninth Circuit's consideration of the subject. It suffices to realize that our holding that fair use can occur along with some degree of confusion does not foreclose the relevance of the extent of any likely consumer confusion in assessing whether a defendant's use is objectively fair. Two Courts of Appeals have found it relevant to consider such scope, and commentators and *amici* here have urged us to say that the degree of likely consumer confusion bears not only on the fairness of using a term, but even on the further question whether an originally descriptive term has become so identified as a mark that a defendant's use of it cannot realistically be called descriptive. See *Shakespeare Co.* v. *Silstar Corp.*, 110 F. 3d, at 243 ("[T]o the degree that confusion is likely, a use is less likely to be found fair . . ." (emphasis deleted)); *Sunmark, Inc.* v. *Ocean Spray Cranberries, Inc.*, 64 F. 3d, at 1059; Restatement § 28; Brief for American Intellectual Property Law Association as *Amicus Curiae* 13–18; Brief for Private Label Manufacturers Association as *Amicus Curiae* 16–17; Brief for Society of Permanent Cosmetic Professionals et al. as *Amici Curiae* 8–11.

Since we do not rule out the pertinence of the degree of consumer confusion under the fair use defense, we likewise do not pass upon the position of the United States, as *amicus*, that the "used fairly" requirement in § 1115(b)(4) demands only that the descriptive term describe the goods accurately. Tr. of Oral Arg. 17. Accuracy of course has to be a consideration in assessing fair use, but the proceedings in this case so far raise no occasion to evaluate some other concerns that courts might pick as relevant, quite apart from attention to confusion. The Restatement raises possibilities like commercial justification and the strength of the plaintiff's mark. Restatement § 28. As to them, it is enough to say here that the door is not closed.

III

In sum, a plaintiff claiming infringement of an incontestable mark must show likelihood of consumer confusion as part of the prima facie case, 15 U. S. C. § 1115(b), while the defendant has no independent burden to negate the likelihood of any confusion in raising the affirmative defense that a term is used descriptively, not as a mark, fairly, and in good faith, § 1115(b)(4).

Because we read the Court of Appeals as requiring KP to shoulder a burden on the issue of confusion, we vacate the judgment and remand the case for further proceedings consistent with this opinion.[6]

It is so ordered.

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[6] The record indicates that on remand the courts should direct their attention in particular to certain factual issues bearing on the fair use defense, properly applied. The District Court said that Lasting's motion for summary adjudication conceded that KP used "microcolor" descriptively and not as a mark. Case No. SA CV 00–276–GLT (EEx), at 8, App. to Pet. for Cert. 29a. We think it is arguable that Lasting made those concessions only as to KP's use of "microcolor" on bottles and flyers in the early 1990's, not as to the stylized version of "microcolor" that appeared in KP's 1999 brochure. See Opposition to Motion for Summary Judgment/Adjudication in Case No. SA CV 00–276–GLT (EEx) (CD Cal.), pp. 18–19; Appellants' Opening Brief in No. 01–56055 (CA9), pp. 31–32. We also note that the fair use analysis of KP's employment of the stylized version of "microcolor" on its brochure may differ from that of its use of the term on the bottles and flyers.

Syllabus

KOWALSKI, JUDGE, 26TH JUDICIAL CIRCUIT COURT OF MICHIGAN, ET AL. *v.* TESMER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03–407. Argued October 4, 2004—Decided December 13, 2004

After Michigan's Constitution was amended to require that an appeal by an accused pleading guilty or *nolo contendere* be by leave of the court, several state judges denied appointed appellate counsel to indigents pleading guilty, and the Michigan Legislature subsequently codified this practice. The two attorney respondents joined three indigent criminal defendants in filing suit in Federal District Court, alleging that the practice denies indigents their federal due process and equal protection rights. The District Court held the practice and statute unconstitutional, but a Sixth Circuit panel reversed, holding that *Younger* v. *Harris*, 401 U. S. 37, abstention barred the indigents' suit, but that the attorneys had third-party standing to assert the indigents' rights; and that the statute was constitutional. On rehearing, the en banc Sixth Circuit agreed on standing but found the statute unconstitutional.

Held: The attorneys lack third-party standing to assert the rights of Michigan indigent defendants denied appellate counsel. The Court assumes that the attorneys have satisfied Article III's standing requirement and thus addresses only whether they have standing to raise the rights of others. In deciding whether to grant third-party standing, this Court asks whether the party asserting the right has a "close" relationship with the person who possesses the right, and whether there is a "hindrance" to the possessor's ability to protect his own interests. *Powers* v. *Ohio*, 499 U. S. 400, 411. The attorneys here claim standing based on a future attorney-client relationship with as yet unascertained Michigan criminal defendants who will request, but be denied, appellate counsel under the statute. In two cases in which this Court found an attorney-client relationship sufficient to confer third-party standing—*Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, and *Department of Labor* v. *Triplett*, 494 U. S. 715—the attorneys invoked known clients' rights, not those of the *hypothetical* clients asserted here. And *Department of Labor* v. *Triplett*—in which an attorney disciplined by his state bar for accepting a fee prohibited by the Black Lung Benefits Act of 1972 was held to have third-party standing to invoke claimants' due process rights to challenge the fee restriction that resulted in his punishment—falls within the class of cases allowing "standing to litigate

Syllabus

the rights of third parties when enforc[ing] the challenged restriction against the litigant would result indirectly in the violation of third parties' rights," *Warth* v. *Seldin*, 422 U. S. 490, 510. The attorneys here do not have a "close relationship" with their alleged "clients"; indeed, they have no relationship at all. Nor have they demonstrated any "hindrance" to the indigents' advancing their own constitutional rights against the Michigan scheme. An indigent may seek leave to challenge the denial of appellate counsel in state court and then may seek a writ of certiorari in this Court; and both state and federal collateral review exist beyond that. The attorneys' hypothesis that, without counsel, such avenues are effectively foreclosed was disproved in the Michigan courts and this Court, where *pro se* indigents have pursued them. On a more fundamental level, if an attorney is all that the indigents need to perfect their challenge in state court and beyond, one wonders why these attorneys did not attend state court and assist them. The fair inference is that they did not want the state process to take its course, but wanted a federal court to short circuit the State's adjudication of the constitutional question. Here, the indigents were appropriately dismissed under *Younger* because they had ample opportunities to raise their constitutional challenge in their ongoing state proceedings. An unwillingness to allow the *Younger* principle to be thus circumvented is an additional reason to deny the attorneys third-party standing. Pp. 128–134.

333 F. 3d 683, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, THOMAS, and BREYER, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 134. GINSBURG, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, *post*, p. 136.

Thomas L. Casey, Solicitor General of Michigan, argued the cause for petitioners. With him on the briefs was *Michael A. Cox*, Attorney General. *Judy E. Bregman* filed briefs for respondent Kolenda in support of petitioners under this Court's Rule 12.6.

David A. Moran argued the cause for respondents Tesmer et al. With him on the briefs were *Michael J. Steinberg*, *Kary L. Moss*, *Mark Granzotto*, and *Steven R. Shapiro*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Iowa et al. by *Thomas J. Miller*, Attorney General of Iowa, *Douglas R. Marek*, Deputy Attorney General, *Darrel Mullins*, Assistant Attorney General,

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case involves a constitutional challenge to Michigan's procedure for appointing appellate counsel for indigent defendants who plead guilty. The only challengers before us are two attorneys who seek to invoke the rights of hypothetical indigents to challenge the procedure. We hold that the attorneys lack standing and therefore do not reach the question of the procedure's constitutionality.

In 1994, Michigan amended its Constitution to provide that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court" and not as of right. Mich. Const., Art. I, § 20. Following this amendment, several Michigan state judges began to deny appointed appellate counsel to indigents who pleaded guilty, and the Michigan Legislature subsequently codified this practice.[1] See Mich. Comp. Laws Ann. § 770.3a (West 2000). Under the statute,

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and *Gene C. Schaerr*, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Charles J. Crist* of Florida, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.*, of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Henry D. McMaster* of South Carolina, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Jerry W. Kilgore* of Virginia, and *Christine O. Gregoire* of Washington; and for Wayne County, Michigan, by *Timothy A. Baughman*.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Dennis W. Archer*, *Seth P. Waxman*, and *Paul R. Q. Wolfson;* for the National Association of Criminal Defense Lawyers et al. by *Anthony J. Franze*, *Sheila B. Scheuerman*, *Steven D. Benjamin*, and *Paul M. Rashkind;* and for the National Legal Aid and Defender Association by *Elliot H. Scherker* and *Karen M. Gottlieb*.

[1] The statute limits appellate counsel for defendants who "plea[d] guilty, guilty but mentally ill, or nolo contendere." Mich. Comp. Laws Ann. § 770.3a(1) (West 2000). For simplicity, we shall refer only to defendants who plead guilty, although our analysis applies to all three situations.

which was scheduled to go into effect on April 1, 2000, appointment of appellate counsel for indigents who plead guilty is prohibited, with certain mandatory and permissive exceptions. *Ibid.*

A challenge to the Michigan practice was filed in the United States District Court for the Eastern District of Michigan. The named plaintiffs included the two attorney respondents and three indigents who were denied appellate counsel after pleading guilty. Pursuant to Rev. Stat. § 1979, 42 U. S. C. § 1983, they alleged that the Michigan practice and statute denied indigents their federal constitutional rights to due process and equal protection. They sought declaratory and injunctive relief against the practice and the statute.

A day before the statute was to take effect, the District Court issued an order holding the practice and statute unconstitutional. *Tesmer* v. *Granholm*, 114 F. Supp. 2d 603 (2000). It ultimately issued an injunction that bound all Michigan state judges, requiring them not to deny appellate counsel to any indigent who pleaded guilty. 114 F. Supp. 2d 622 (2000). A panel of the Court of Appeals for the Sixth Circuit reversed. *Tesmer* v. *Granholm*, 295 F. 3d 536 (2002). The panel held that *Younger* v. *Harris*, 401 U. S. 37 (1971), abstention barred the suit by the indigents but that the attorneys had third-party standing to assert the rights of indigents. It then held that the statute was constitutional. The Court of Appeals granted rehearing en banc and reversed. *Tesmer* v. *Granholm*, 333 F. 3d 683 (2003). The en banc majority agreed with the panel on standing but found that the statute was unconstitutional. Separate dissents were filed, challenging the application of third-party standing and the holding that the statute was unconstitutional. We granted certiorari. 540 U. S. 1148 (2004).

The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth*

v. *Seldin*, 422 U. S. 490, 498 (1975). In this case, we do not focus on the constitutional minimum of standing, which flows from Article III's case-or-controversy requirement. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992). Instead, we shall assume the attorneys have satisfied Article III and address the alternative threshold question whether they have standing to raise the rights of others. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 585 (1999).[2]

We have adhered to the rule that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, *supra*, at 499. This rule assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation. See 422 U. S., at 500. It represents a "healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed," *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 955, n. 5 (1984), the courts might be "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights," *Warth* v. *Seldin*, *supra*, at 500.

We have not treated this rule as absolute, however, recognizing that there may be circumstances where it is necessary

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[2] To satisfy Article III, a party must demonstrate an "injury in fact"; a causal connection between the injury and the conduct of which the party complains; and that it is "likely" a favorable decision will provide redress. *Lujan* v. *Defenders of Wildlife*, 504 U. S., at 560–561 (internal quotation marks omitted). In this case, the attorneys alleged "injury in fact" flows from their contention that the Michigan system "has reduced the number of cases in which they could be appointed and paid as assigned appellate counsel." App. 16a, ¶ 35 (Complaint). This harm, they allege, would be remedied by declaratory and injunctive relief aimed at the system. Again, we assume, without deciding, that these allegations are sufficient. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S., at 585.

to grant a third party standing to assert the rights of another. But we have limited this exception by requiring that a party seeking third-party standing make two additional showings. First, we have asked whether the party asserting the right has a "close" relationship with the person who possesses the right. *Powers* v. *Ohio*, 499 U. S. 400, 411 (1991). Second, we have considered whether there is a "hindrance" to the possessor's ability to protect his own interests. *Ibid.*

We have been quite forgiving with these criteria in certain circumstances. "Within the context of the First Amendment," for example, "the Court has enunciated other concerns that justify a lessening of prudential limitations on standing." *Secretary of State of Md.* v. *Joseph H. Munson Co., supra*, at 956. And "[i]n several cases, this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Warth* v. *Seldin, supra*, at 510 (emphasis added) (citing *Doe* v. *Bolton*, 410 U. S. 179 (1973); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Barrows* v. *Jackson*, 346 U. S. 249 (1953)); see *Craig* v. *Boren*, 429 U. S. 190 (1976). Beyond these examples—none of which is implicated here—we have not looked favorably upon third-party standing. See, *e. g.*, *Conn* v. *Gabbert*, 526 U. S. 286, 292–293 (1999) (rejecting an attorney's attempt to adjudicate the rights of a client). With this in mind, we turn to apply our "close relationship" and "hindrance" criteria to the facts before us.

The attorneys in this case invoke the attorney-client relationship to demonstrate the requisite closeness. Specifically, they rely on a future attorney-client relationship with as yet unascertained Michigan criminal defendants "who will request, but be denied, the appointment of appellate counsel, based on the operation" of the statute. App. 17a, ¶ 37 (Complaint). In two cases, we have recognized an attorney-client relationship as suffiicient to confer third-party standing.

See *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617 (1989); *Department of Labor* v. *Triplett*, 494 U. S. 715 (1990). In *Caplin & Drysdale, Chartered* v. *United States*, *supra*, we granted a law firm third-party standing to challenge a drug forfeiture statute by invoking the rights of an existing client. *Id.*, at 624, n. 3. This *existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here.

In *Department of Labor* v. *Triplett*, *supra*, we dealt with the Black Lung Benefits Act of 1972, which prohibited attorneys from accepting fees for representing claimants, unless such fees were approved by the appropriate agency or court. 30 U. S. C. § 932(a) (1982 ed., Supp. V). An attorney, George Triplett, violated the Act and its implementing regulations by agreeing to represent claimants for 25% of any award obtained and then collecting those fees without the required approval. The state bar disciplined Triplett, and we allowed Triplett third-party standing to invoke the due process rights of the claimants to challenge the fee restriction that resulted in his punishment. 494 U. S., at 720–721. *Triplett* is different from this case on two levels. First, *Triplett* falls within that class of cases where we have "allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Warth* v. *Seldin*, *supra*, at 510 (emphasis added). Second, and similar to *Caplin & Drysdale*, *Triplett* involved the representation of known claimants. The attorneys before us do not have a "close relationship" with their alleged "clients"; indeed, they have no relationship at all.

We next consider whether the attorneys have demonstrated that there is a "hindrance" to the indigents' advancing their own constitutional rights against the Michigan scheme. *Powers* v. *Ohio*, *supra*, at 411. It is uncontested that an indigent denied appellate counsel has open avenues to argue that denial deprives him of his constitutional rights.

He may seek leave to challenge that denial in the Michigan Court of Appeals and, if denied, seek leave in the Michigan Supreme Court. See Mich. Comp. Laws Ann. § 770.3 (West Supp. 2004). He then may seek a writ of certiorari in this Court. See 28 U. S. C. § 1257(a). Beyond that, there exists both state and federal collateral review. See Mich. Rule Crim. Proc. 6.500 (2004); 28 U. S. C. § 2254.

The attorneys argue that, without counsel, these avenues are effectively foreclosed to indigents. They claim that unsophisticated, *pro se* criminal defendants could not satisfy the necessary procedural requirements, and, if they did, they would be unable to coherently advance the substance of their constitutional claim.

That hypothesis, however, was disproved in the Michigan courts, see, *e. g.*, *People* v. *Jackson*, 463 Mich. 949, 620 N. W. 2d 528 (2001) (*pro se* defendant sought leave to appeal denial of appointment of appellate counsel to the Michigan Court of Appeals and the Michigan Supreme Court); *People* v. *Wilkins*, 463 Mich. 949, 620 N. W. 2d 528 (2001) (same), and this Court, see Pet. for Cert. in *Halbert* v. *Michigan*, O. T. 2004, No. 03–10198 (pending request for writ of certiorari by a *pro se* defendant challenging the denial of appellate counsel). While we agree that an attorney would be valuable to a criminal defendant challenging the constitutionality of the scheme, we do not think that the lack of an attorney here is the type of hindrance necessary to allow another to assert the indigent defendants' rights. See *Powers* v. *Ohio*, *supra*, at 411.

We also are unpersuaded by the attorneys' "hindrance" argument on a more fundamental level. If an attorney is all that the indigents need to perfect their challenge in state court and beyond, one wonders why the attorneys asserting this § 1983 action did not attend state court and assist them. We inquired into this question at oral argument but did not receive a satisfactory answer. See Tr. of Oral Arg. 28–29, 35–40. It is a fair inference that the attorneys and the three

indigent plaintiffs that filed this § 1983 action did not want to allow the state process to take its course. Rather, they wanted a federal court to short circuit the State's adjudication of this constitutional question. That is precisely what they got.

"[F]ederal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S., at 586. The doctrine of *Younger* v. *Harris*, 401 U. S. 37 (1971), reinforces our federal scheme by preventing a state criminal defendant from asserting ancillary challenges to ongoing state criminal procedures in federal court. *Id.*, at 54–55.

In this case, the three indigent criminal defendants who were originally plaintiffs in this § 1983 action were appropriately dismissed under *Younger*. As the Court of Appeals unanimously recognized, they had ongoing state criminal proceedings and ample avenues to raise their constitutional challenge in those proceedings.[3] 333 F. 3d, at 690–691. There also was no extraordinary circumstance requiring federal intervention. *Ibid.* An unwillingness to allow the *Younger* principle to be thus circumvented is an additional reason to deny the attorneys third-party standing.[4]

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[3] The Court of Appeals suggested, however, that adverse Michigan precedent on the merits of the constitutional claim made any resort to the state courts futile and thus justified the attorneys' sally into federal court. 333 F. 3d, at 695. But forum shopping of this kind is not a basis for third-party standing. See, *e. g.*, *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 624, n. 3 (1989).

[4] The mischief that resulted from allowing the attorneys to circumvent *Younger* is telling. By the time the Michigan Supreme Court had a chance to rule on even the prestatutory practice, see *People* v. *Bulger*, 462 Mich. 495, 614 N. W. 2d 103 (July 18, 2000) (holding the practice constitutional), the Federal District Court had ruled the prestatutory practice *and* the impending statute itself unconstitutional. 114 F. Supp. 2d 603, 622 (ED Mich., Mar. 31, 2000). It also had issued an injunction against all Michigan judges, instructing them to appoint counsel (regardless of what their own Supreme Court said). 114 F. Supp. 2d 622 (ED Mich., June 30,

In sum, we hold that the attorneys do not have third-party standing to assert the rights of Michigan indigent defendants denied appellate counsel. We agree with the dissenting opinion in the Court of Appeals that "it would be a short step from the . . . grant of third-party standing in this case to a holding that lawyers generally have third-party standing to bring in court the claims of future unascertained clients."[5] 333 F. 3d, at 709 (Rogers, J., concurring in part and dissenting in part).

The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

That this case is even remotely close demonstrates that our third-party standing cases have gone far astray. We have granted third-party standing in a number of cases to litigants whose relationships with the directly affected individuals were at best remote. We have held, for instance, that beer vendors have standing to raise the rights of their prospective young male customers, see *Craig* v. *Boren*, 429 U. S. 190, 192–197 (1976); that criminal defendants have standing to raise the rights of jurors excluded from service,

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2000). Thus, the Federal District Court effectively trumped the Michigan Supreme Court's ruling; caused unnecessary conflict between the federal and state courts; and caused confusion among Michigan judges attempting to implement these conflicting commands.

[5] As Judge Rogers explained, the lawyer would have to make a credible claim that a challenged regulation would affect his income to satisfy Article III; after that, however, the possibilities would be endless. 333 F. 3d, at 709. A medical malpractice attorney could assert an abstract, generalized challenge to tort reform statutes by asserting the rights of some hypothetical malpractice victim (or victims) who might sue. *Id.*, at 710. An attorney specializing in Social Security cases could challenge implementation of a new regulation by asserting the rights of some hypothetical claimant (or claimants). *Ibid.* And so on.

see *Powers* v. *Ohio*, 499 U. S. 400, 410–416 (1991); that sellers of mail-order contraceptives have standing to assert the rights of potential customers, see *Carey* v. *Population Services Int'l*, 431 U. S. 678, 682–684 (1977); that distributors of contraceptives to unmarried persons have standing to litigate the rights of the potential recipients, *Eisenstadt* v. *Baird*, 405 U. S. 438, 443–446 (1972); and that white sellers of land have standing to litigate the constitutional rights of potential black purchasers, see *Barrows* v. *Jackson*, 346 U. S. 249, 254–258 (1953). I agree with the Court that "[t]he attorneys before us do not have a 'close relationship' with their alleged 'clients'; indeed, they have no relationship at all." *Ante*, at 131. The Court of Appeals understandably could have thought otherwise, given how generously our precedents have awarded third-party standing.

It is doubtful whether a party who has no personal constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others. Before *Truax* v. *Raich*, 239 U. S. 33, 38–39 (1915), and *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535–536 (1925), this Court adhered to the rule that "[a] court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it." *Clark* v. *Kansas City*, 176 U. S. 114, 118 (1900) (internal quotation marks omitted).* This made sense. Litigants who have no personal right at stake may have very different interests from the individuals whose rights they are raising. Moreover, absent a personal right, a litigant has no cause of action (or defense), and thus no right to relief. It may be too late in the day to return to this traditional view. But even assuming it makes sense to grant litigants

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*See also *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 406–407 (1900); *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 220 (1903); *Owings* v. *Norwood's Lessee*, 5 Cranch 344, 348 (1809) (Marshall, C. J.); *In re Wellington*, 33 Mass. 87, 96 (1834) (Shaw, C. J.); *Barrows* v. *Jackson*, 346 U. S. 249, 264–266, and n. 6 (1953) (Vinson, C. J., dissenting).

third-party standing in at least some cases, it is more doubtful still whether third-party standing should sweep as broadly as our cases have held that it does.

Because the Court's opinion is a reasonable application of our precedents, I join it in full.

JUSTICE GINSBURG, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

Plaintiffs-respondents Arthur M. Fitzgerald and Michael D. Vogler are Michigan attorneys who have routinely received appointments to represent defendants in state-court criminal appeals, including appeals from plea-based convictions. They assert third-party standing to challenge a state law limiting an indigent's right to counsel: As codified in Mich. Comp. Laws Ann. § 770.3a(1) (West 2000), the challenged law prescribes that most indigents

> "who plea[d] guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence."

The attorneys before us emphasize that indigent defendants generally are unable to navigate the appellate process *pro se*. In view of that reality, the attorneys brought this action under 42 U. S. C. § 1983, to advance indigent defendants' constitutional right to counsel's aid in pursuing appeals from plea-based convictions.

"Ordinarily," attorneys Fitzgerald and Vogler acknowledge, "one may not claim standing . . . to vindicate the constitutional rights of [a] third party." *Barrows* v. *Jackson*, 346 U. S. 249, 255 (1953). The Court has recognized exceptions to the general rule, however, when certain circumstances combine: (1) "The litigant [has] suffered an 'injury in fact,' . . . giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute"; (2) "the litigant [has] a close relation to the third party"; and (3) "there [exists] some hindrance to the third party's ability to protect his or her own interests." *Powers* v. *Ohio*, 499 U. S. 400, 411 (1991) (quot-

ing *Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976)). The first requirement is of a different order than the second and third, for whether a litigant meets the constitutional prescription of injury in fact determines whether his suit is "a case or controversy subject to a federal court's Art. III jurisdiction." *Ibid.* By contrast, the close relation and hindrance criteria are "prudential considerations," *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 955 (1984), "judge made rule[s] . . . fashion[ed] for our own governance," *id.*, at 972 (STEVENS, J., concurring). Our precedent leaves scant room for doubt that attorneys Fitzgerald and Vogler have shown both injury in fact, and the requisite close relation to indigent defendants who seek the assistance of counsel to appeal from plea-based convictions. I conclude, as well, that those attorneys have demonstrated a formidable hindrance to the indigents' ability to proceed without the aid of counsel.

As to injury in fact, attorneys Fitzgerald and Vogler alleged in their complaint that Mich. Comp. Laws Ann. § 770.3a would cause them direct economic loss because it will "reduc[e] the number of cases in which they could be appointed and paid as assigned appellate counsel." App. 16a. This allegation is hardly debatable. The Michigan system for assigning appellate attorneys to indigent defendants operates on a strict rotation. With fewer cases to be assigned under the new statute, the pace of the rotation would slow, and Fitzgerald and Vogler, who are on the rosters for assignment, would earn less for representation of indigent appellants than they earned in years prior to the cutback on state-funded appeals.[1]

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[1] True, in several cases in which third-party standing was upheld on the basis of economic injury, the law in question proscribed conduct in which the challenger sought to engage. See, *e. g.*, *Craig* v. *Boren*, 429 U. S. 190, 192–194 (1976) (beer vendor prohibited from selling 3.2% beer to males aged 18–21). Our decisions confirm, however, that a plaintiff's exposure to an enforcement action is not essential to an injury-in-fact determination. See *Singleton* v. *Wulff*, 428 U. S. 106 (1976); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925).

In *Singleton*, 428 U. S. 106, two physicians challenged state restrictions imposed on funding for abortions. Eight Members of this Court determined that the physicians had adequately alleged concrete injury: "If the physicians prevail[ed] in their suit . . . they [would] then receive payment . . . [and t]he State (and Federal Government) [would] be out of pocket by the amount of the payments." *Id.*, at 113; see *id.*, at 122–123 (Powell, J., concurring as to injury in fact). Inescapably, the same reasoning applies to attorneys Fitzgerald and Vogler. They have alleged their past, state-paid representation of indigent defendants in appeals from plea-based convictions, and their aim to continue such representation in the future. As in *Singleton*, they will suffer injury "concrete and particularized[,] . . . actual or imminent, not conjectural or hypothetical," *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 180 (2000), if Michigan's statute holds sway. See generally R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 177–178, and n. 5 (5th ed. 2003).

Nor, under our precedent, should attorneys Fitzgerald and Vogler encounter a "close relation" shoal. Our prior decisions do not warrant the distinction between an *"existing"* relationship and a *"hypothetical"* relationship that the Court advances today. *Ante*, at 131. See, *e. g.*, *Carey* v. *Population Services Int'l*, 431 U. S. 678, 683 (1977) (corporate distributor of contraceptives could challenge state law limiting sale of its products, "not only in its own right but also on behalf of its *potential* customers" (emphasis added)); *Griswold* v. *Connecticut*, 381 U. S. 479, 481 (1965) (noting that in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), "the owners of private schools were entitled to assert the rights of *potential* pupils and their parents," and in *Barrows*, "a white defendant . . . was allowed to raise . . . the rights of *prospective* Negro purchasers" (emphases added)).

Without suggesting that the timing of a relationship is key, the Court's decisions have focused on the character of the relationship between the litigant and the rightholder. See *Munson*, 467 U. S., at 973 (STEVENS, J., concurring) (propriety of third-party standing depends on "the nature of the relationship"). *Singleton*, for example, acknowledged the significant bond between physician and patient. See 428 U. S., at 117 (plurality opinion) ("[T]he physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, [the abortion] decision.").[2] Similarly, this Court has twice recognized, in the third-party standing context, that the attorney-client relationship is of "special consequence." See *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 623–624, n. 3 (1989); *Department of Labor* v. *Triplett*, 494 U. S. 715, 720 (1990).[3] Moreover, the Court has found an adequate "relation" between litigants alleging third-party standing and those whose rights they seek to assert when nothing more than a buyer-seller connection was at stake. See *Carey*, 431 U. S., at 683; *Craig* v. *Boren*, 429 U. S. 190, 195 (1976).

Thus, as I see it, this case turns on the last of the three third-party standing inquiries, here, the existence of an impediment to the indigent defendants' effective assertion of their own rights through litigation. I note first that the Court has approached this requirement with a degree of elasticity. See *id.*, at 216 (Burger, C. J., dissenting) (males between the ages of 18 and 21 who sought to purchase 3.2% beer faced no serious obstacle to asserting their own rights). The hindrance faced by a rightholder need only be "genuine,"

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[2] There can be little doubt that the plurality in *Singleton* would have recognized third-party standing even if the physicians had just opened their clinic at the time they commenced suit.

[3] *Conn* v. *Gabbert*, 526 U. S. 286 (1999), see *ante*, at 130, is not instructive. There, the plaintiff-attorney failed to assert his own injury in fact, 526 U. S., at 289–292, and thus, *a fortiori*, could not assert third-party standing, *id.*, at 292–293.

not "insurmountable." *Singleton*, 428 U. S., at 116–117 (plurality opinion); see also *Munson*, 467 U. S., at 956 ("Where practical obstacles prevent a party from asserting rights on behalf of itself . . . the Court has recognized [third-party standing]."). Even assuming a requirement with more starch than the Court has insisted upon in prior decisions, this case satisfies the "impediment" test.

To determine whether the indigent defendants are impeded from asserting their own rights, one must recognize the incapacities under which these defendants labor and the complexity of the issues their cases may entail. According to the Department of Justice, approximately eight out of ten state felony defendants use court-appointed lawyers. U. S. Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Defense Counsel in Criminal Cases 1, 5 (Nov. 2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf (all Internet materials as visited Dec. 8, 2004, and available in Clerk of Court's case file). Approximately 70% of indigent defendants represented by appointed counsel plead guilty, and 70% of those convicted are incarcerated. *Id.*, at 6 (Tables 10–11). It is likely that many of these indigent defendants, in common with 68% of the state prison population, did not complete high school, U. S. Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Education and Correctional Populations 1 (Jan. 2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf, and many lack the most basic literacy skills, U. S. Dept. of Ed., National Center for Education Statistics, Literacy Behind Prison Walls xviii, 10, 17 (Oct. 1994) (NCES 1994–102), available at http://nces.ed.gov/pubs94/94102.pdf. A Department of Education study found that about seven out of ten inmates fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article. *Id.*, at 10, App. A (Interpreting the Literacy Scales). An inmate so handicapped surely

does not possess the skill necessary to pursue a competent *pro se* appeal.

These indigent and poorly educated defendants face appeals from guilty pleas often no less complex than other appeals. An indigent defendant who pleads guilty may still raise on appeal

> "constitutional defects that are irrelevant to his factual guilt, double jeopardy claims requiring no further factual record, jurisdictional defects, challenges to the sufficiency of the evidence at the preliminary examination, preserved entrapment claims, mental competency claims, factual basis claims, claims that the state had no right to proceed in the first place, including claims that a defendant was charged under an inapplicable statute, and claims of ineffective assistance of counsel." *People* v. *Bulger*, 462 Mich. 495, 561, 614 N. W. 2d 103, 133–134 (2000) (Cavanagh, J., dissenting) (citations omitted).

The indigent defendant pursuing his own appeal must also navigate Michigan's procedures for seeking leave to appeal after sentencing on a guilty plea. Michigan's stated Rule requires a defendant to file an application for appeal within 21 days after entry of the judgment. Mich. Rule App. Proc. 7.205(A) (2004). The defendant must submit five copies of the application "stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; [and] setting forth a concise argument . . . in support of the appellant's position on each issue." Rule 7.205(B)(1). The State Court Administrative Office has furnished a three-page form application accompanied by two pages of instructions for defendants seeking leave to appeal after sentencing on a guilty plea. But this form is unlikely to provide adequate aid to an indigent and poorly educated defendant. The form requires entry of such information as "charge code(s), MCL citation/PACC Code," asks the applicant to state the issues

and facts relevant to the appeal, and then requires the applicant to "state the law that supports your position and explain how the law applies to the facts of your case." Application for Leave to Appeal After Sentencing on Plea of Guilty or Nolo Contendere, http://courts.michigan.gov/scao/courtforms/appeals/cc405.pdf (rev. Oct. 2003). This last task would not be onerous for an applicant familiar with law school examinations, but it is a tall order for a defendant of marginal literacy.[4]

The Court, agreeing with Judge Rogers' dissent from the en banc Sixth Circuit decision, writes that recognizing third-party standing here would allow lawyers generally to assert standing to champion their potential clients' rights. *Ante*, at 134, n. 5. For example, a medical malpractice attorney could challenge a tort reform statute on behalf of a future client or a Social Security lawyer could challenge new regulations. *Ibid.*; *Tesmer* v. *Granholm*, 333 F. 3d 683, 709–710 (CA6 2003). In such cases, however, in marked contrast to the instant case, the persons directly affected—malpractice plaintiffs or benefits claimants—would face no unusual obstacle in securing the aid of counsel to attack the disadvantageous statutory or regulatory change. There is no cause, therefore, to allow an attorney to challenge the benefit- or award-reducing provision in a suit brought in the attorney's name. The party whose interests the provision directly impacts can instead mount the challenge with the aid of counsel.

This case is "unusual because it is the deprivation of counsel itself that prevents indigent defendants from protecting

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[4] The rare case of an unusually effective *pro se* defendant is the exception that proves the rule: The Court identifies three Michigan defendants who pursued right-to-counsel claims *pro se*. *Ante*, at 132. The fact that a handful of *pro se* defendants has brought claims shows neither that the run-of-the-mine defendant can successfully navigate state procedures nor that he can effectively represent himself on the merits.

their right to counsel." Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 17. The challenged statute leaves indigent criminal defendants without the aid needed to gain access to the appellate forum and thus without a viable means to protect their rights. Cf. *Evitts* v. *Lucey*, 469 U. S. 387, 393 (1985) ("[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits.").

The Court is "unpersuaded by the attorneys' 'hindrance' argument," *ante*, at 132, in the main, because it sees a clear path for Fitzgerald and Vogler: They could have "attend[ed] state court and assist[ed] [indigent defendants,]" *ibid.* Had the attorneys taken this course, hundreds, perhaps thousands, of criminal defendants would have gone uncounseled while the attorneys afforded assistance to a few individuals. In order to protect the rights of *all* indigent defendants, the attorneys sought prospective classwide relief to prevent the statute from taking effect. See Tr. of Oral Arg. 41 ("The problem was we had to file this litigation before the statute went into effect because once the statute went into effect, thousands of Michigan indigents would be denied the right to counsel every year and would suffer probably irreparable damage to their right to appeal.").

This case implicates none of the concerns underlying the Court's prudential criteria. The general prohibition against third-party standing "'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy,' and it assures the court that the issues before it will be concrete and sharply presented." *Munson*, 467 U. S., at 955 (quoting *United States* v. *Raines*, 362 U. S. 17, 22 (1960); citation omitted). Attorneys Fitzgerald and Vogler have "properly . . . frame[d] the issues and present[ed] them with the necessary adversar-

ial zeal," 467 U. S., at 956, and whether the indigent defendants whose rights they assert are entitled to counsel is a question fully ripe for resolution.[5]

The Court concludes that the principle of *Younger* v. *Harris*, 401 U. S. 37 (1971), "is an additional reason to deny the attorneys third-party standing." *Ante*, at 133. Whether a federal court should abstain under *Younger* is, of course, distinct from whether a party has standing to sue. See 401 U. S., at 41–42 (dismissing three appellees on standing grounds before addressing the abstention question). *Younger* "[has] little force in the absence of a pending state proceeding." *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974) (quoting *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 509 (1972)). "When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." 415 U. S., at 462; accord *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 930 (1975). Attorneys Fitzgerald and Vogler filed this suit before the Michigan statute took effect. At that time, *no* state criminal proceeding governed by the statute existed with which this suit could interfere.[6]

In sum, this case presents an unusual if not unique case of defendants facing near-insurmountable practical obstacles to protecting their rights in the state forum: First, it is the deprivation of counsel itself that prevents indigent defend-

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[5] Considerations of economy—the parties have fully briefed and argued this case—also favor reaching the merits.

[6] I agree with the Court that *Younger* would force the *indigent defendants* to pursue their claims in state court, as *Younger* has a stricter impediment requirement than the third-party standing doctrine. *Younger* v. *Harris*, 401 U. S. 37, 53 (1971) (requiring "extraordinary circumstances" before allowing federal intervention).

ants, many of whom are likely to be unsophisticated and poorly educated, from protecting their rights; second, the substantive issues that such defendants could raise in an appeal are myriad and often complicated; and third, the procedural requirements for an appeal after a guilty plea are not altogether indigent-user friendly. The exposure of impecunious defendants to these access-to-appeal blockages in state court makes the need for this suit all the more compelling.

* * *

For the reasons stated, I would affirm the en banc Sixth Circuit decision that attorneys Fitzgerald and Vogler have standing to maintain the instant action and would proceed to the merits of the controversy.

Syllabus

DEVENPECK ET AL. *v.* ALFORD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–710. Argued November 8, 2004—Decided December 13, 2004

Believing that respondent was impersonating a police officer, petitioner Haner, a Washington State Patrol officer, pursued and pulled over respondent's vehicle. While questioning respondent at the scene, petitioner Devenpeck, Haner's supervisor, discovered that respondent was taping their conversation and arrested him for violating the State's Privacy Act. The state trial court subsequently dismissed the charge. Respondent then filed this suit in federal court, claiming, among other things, that his arrest violated the Fourth and Fourteenth Amendments. The District Court denied petitioners qualified immunity, and the case went to trial. The jury was instructed, *inter alia*, that respondent had to establish lack of probable cause to arrest, and that taping police at a traffic stop was not a crime in Washington. The jury found for petitioners. The Ninth Circuit reversed, based in part on its conclusion that petitioners could not have had probable cause to arrest. It rejected petitioners' claim that there was probable cause to arrest for impersonating and for obstructing a law enforcement officer, because those offenses were not "closely related" to the offense invoked by Devenpeck at the time of arrest.

Held:

1. A warrantless arrest by a law officer is reasonable under the Fourth Amendment if, given the facts known to the officer, there is probable cause to believe that a crime has been or is being committed. The Ninth Circuit's additional limitation—that the offense establishing probable cause must be "closely related" to, and based on the same conduct as, the offense the arresting officer identifies at the time of arrest—is inconsistent with this Court's precedent, which holds that an arresting officer's state of mind (except for facts that he knows) is irrelevant to probable cause, see *Whren* v. *United States*, 517 U. S. 806, 812–815. The "closely related offense" rule is also condemned by its perverse consequences: It will not eliminate sham arrests but will cause officers to cease providing reasons for arrest, or to cite every class of offense for which probable cause could conceivably exist. Pp. 152–156.

Syllabus

2. This Court will not decide in the first instance whether petitioners lacked probable cause to arrest respondent for either obstructing or impersonating an officer because the Ninth Circuit, having found those offenses legally irrelevant, did not decide that question. P. 156.

333 F. 3d 972, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which all other Members joined, except REHNQUIST, C. J., who took no part in the decision of the case.

Maureen A. Hart, Senior Assistant Attorney General of Washington, argued the cause for petitioners. With her on the briefs were *Christine O. Gregoire*, Attorney General, *Robert K. Costello*, Deputy Attorney General, *William Berggren Collins*, Senior Assistant Attorney General, *Michael P. Lynch*, and *Eric A. Mentzer*, Assistant Attorney General.

Deputy Attorney General Comey argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Acting Solicitor General Clement*, former *Solicitor General Olson*, *Assistant Attorneys General Keisler* and *Wray*, *Deputy Solicitor General Dreeben*, *John P. Elwood*, *Joel M. Gershowitz*, and *Richard A. Olderman*.

R. Stuart Phillips argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel M. Medeiros*, State Solicitor, *Robert R. Anderson*, Chief Assistant Attorney General, *Mary Jo Graves*, Senior Assistant Attorney General, *Janet E. Neeley*, Supervising Deputy Attorney General, and *Lee E. Seale* and *Patrick J. Whalen*, Deputy Attorneys General, by *Anabelle Rodríguez*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *M. Jane Brady* of Delaware, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Charles C. Foti, Jr.*, of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Gerald J. Pappert* of Pennsylvania, *Henry McMaster* of South Carolina, and *Mark L. Shurtleff* of Utah; for the Center for the Community Interest by *Miguel A. Estrada* and *Thomas*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether an arrest is lawful under the Fourth Amendment when the criminal offense for which there is probable cause to arrest is not "closely related" to the offense stated by the arresting officer at the time of arrest.

I

A

On the night of November 22, 1997, a disabled automobile and its passengers were stranded on the shoulder of State Route 16, a divided highway, in Pierce County, Washington. *Alford* v. *Haner*, 333 F. 3d 972, 974 (CA9 2003); App. 94, 98. Respondent Jerome Alford pulled his car off the road behind the disabled vehicle, activating his "wig-wag" headlights (which flash the left and right lights alternately). As he pulled off the road, Officer Joi Haner of the Washington State Patrol, one of the two petitioners here, passed the disabled car from the opposite direction. 333 F. 3d, at 974. He turned around to check on the motorists at the first opportunity, and when he arrived, respondent, who had begun helping the motorists change a flat tire, hurried back to his car and drove away. *Ibid.* The stranded motorists asked Haner if respondent was a "cop"; they said that respondent's statements, and his flashing, wig-wag headlights, had given them that impression. *Ibid.*; App. 96. They also informed Haner that as respondent hurried off he left his flashlight behind. *Id.*, at 97.

On the basis of this information, Haner radioed his supervisor, Sergeant Gerald Devenpeck, the other petitioner here, that he was concerned respondent was an "impersonator"

H. Dupree, Jr.; and for the National League of Cities et al. by *Richard Ruda* and *Andrew J. Pincus*.

Jonathan D. Hacker and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

or "wannabe cop." *Id.*, at 97–98. He pursued respondent's vehicle and pulled it over. 333 F. 3d, at 975. Through the passenger-side window, Haner observed that respondent was listening to the Kitsap County Sheriff's Office police frequency on a special radio, and that handcuffs and a hand-held police scanner were in the car. *Ibid.* These facts bolstered Haner's suspicion that respondent was impersonating a police officer. App. 106, 107. Haner thought, moreover, that respondent seemed untruthful and evasive: He told Haner that he had worked previously for the "State Patrol," but under further questioning, claimed instead to have worked in law enforcement in Texas and at a shipyard. *Ibid.* He claimed that his flashing headlights were part of a recently installed car-alarm system, and acted as though he was unable to trigger the system; but during these feigned efforts Haner noticed that respondent avoided pushing a button near his knee, which Haner suspected (correctly) to be the switch for the lights. 333 F. 3d, at 975; App. 108.

Sergeant Devenpeck arrived on the scene a short time later. After Haner informed Devenpeck of the basis for his belief that respondent had been impersonating a police officer, *id.*, at 110, Devenpeck approached respondent's vehicle and inquired about the wig-wag headlights, 333 F. 3d, at 975. As before, respondent said that the headlights were part of his alarm system and that he did not know how to activate them. App. 52, 138–139. Like Haner, Devenpeck was skeptical of respondent's answers. In the course of his questioning, Devenpeck noticed a tape recorder on the passenger seat of respondent's car, with the play and record buttons depressed. 333 F. 3d, at 975. He ordered Haner to remove respondent from the car, played the recorded tape, and found that respondent had been recording his conversations with the officers. Devenpeck informed respondent that he was under arrest for a violation of the Washington Privacy Act, Wash. Rev. Code §9.73.030 (1994). 333 F. 3d, at 975; App. 144–145. Respondent protested that a State Court-of-

Appeals decision, a copy of which he claimed was in his glove compartment, permitted him to record roadside conversations with police officers. 333 F. 3d, at 975; App. 42, 67–68. Devenpeck returned to his car, reviewed the language of the Privacy Act, and attempted unsuccessfully to reach a prosecutor to confirm that the arrest was lawful. *Id.*, at 151–154. Believing that the text of the Privacy Act confirmed that respondent's recording was unlawful,[1] he directed Officer Haner to take respondent to jail. *Id.*, at 154.

A short time later, Devenpeck reached by phone Mark Lindquist, a deputy county prosecutor, to whom he recounted the events leading to respondent's arrest. 333 F. 3d, at 975. The two discussed a series of possible criminal offenses, including violation of the Privacy Act, impersonating a police officer, and making a false representation to an officer. App. 177–178. Lindquist advised that there was "clearly probable cause," *id.*, at 179, and suggested that respondent also be charged with "obstructing a public servant" "based on the runaround [he] gave [Devenpeck]," *id.*, at 157. Devenpeck rejected this suggestion, explaining that the State Patrol does not, as a matter of policy, "stack charges" against an arrestee. *Id.*, at 157–158.

At booking, Haner charged respondent with violating the State Privacy Act, *id.*, at 32–33, and issued a ticket to respondent for his flashing headlights under Wash. Rev. Code § 46.37.280(3) (1994), App. 24–25. Under state law, respondent could be detained on the latter offense only for the period of time "reasonably necessary" to issue a citation.

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[1] The relevant provision of the Washington Privacy Act states:

"Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any . . . [p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation." Wash. Rev. Code § 9.73.030(1)(b) (1994).

§ 46.64.015. The state trial court subsequently dismissed both charges. App. 10, 29.

B

Respondent filed suit against petitioners in Federal District Court. He asserted a federal cause of action under Rev. Stat. § 1979, 42 U. S. C. § 1983, and a state cause of action for unlawful arrest and imprisonment, both claims resting upon the allegation that petitioners arrested him without probable cause in violation of the Fourth and Fourteenth Amendments. 333 F. 3d, at 975. The District Court denied petitioners' motion for summary judgment on grounds of qualified immunity, and the case proceeded to trial. *Alford* v. *Washington State Police*, Case No. C99–5586RJB (WD Wash., Nov. 30, 2000), App. to Pet. for Cert. 40a. The jury was instructed that, for respondent to prevail on either his federal- or state-law claim, he must demonstrate that petitioners arrested him without probable cause, App. 199–201; and that probable cause exists "if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime," *id.*, at 201. The jury was also instructed that, at the time of respondent's arrest, a State Court-of-Appeals decision, *State* v. *Flora*, 68 Wash. App. 802, 845 P. 2d 1355 (1992), had clearly established that respondent's taping of petitioners was not a crime, App. 202. And the jury was directed that it must find for petitioners if a reasonable officer in the same circumstances would have believed respondent's detention was lawful. *Id.*, at 200. Respondent did not object to any of these instructions. The jury returned a unanimous verdict in favor of petitioners. 333 F. 3d, at 975. The District Court denied respondent's motion for judgment as a matter of law or, in the alternative, a new trial, and respondent appealed. *Ibid.*; App. to Pet. for Cert. 25a.

A divided panel of the Court of Appeals for the Ninth Circuit reversed, finding "no evidence to support the jury's verdict," 333 F. 3d, at 975. The majority concluded that petitioners could not have had probable cause to arrest because they cited only the Privacy Act charge and "[t]ape recording officers conducting a traffic stop is not a crime in Washington." *Id.*, at 976. The majority rejected petitioners' claim that probable cause existed to arrest respondent for the offenses of impersonating a law-enforcement officer, Wash. Rev. Code § 9A.60.040(3) (1994), and obstructing a law-enforcement officer, § 9A.76.020, because, it said, those offenses were not "closely related" to the offense invoked by Devenpeck as he took respondent into custody, 333 F. 3d, at 976–977. The majority also held that there was no evidence to support petitioners' claim of qualified immunity, since, given the Washington Court of Appeals' decision in *Flora*, "no objectively reasonable officer could have concluded that arresting [respondent] for taping the traffic stop was permissible," 333 F. 3d, at 979. Judge Gould dissented on the ground that it was objectively reasonable for petitioners to believe that respondent had violated the Privacy Act. See *id.*, at 980. We granted certiorari. 541 U. S. 987 (2004).

II

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. See *United States* v. *Watson*, 423 U. S. 411, 417–424 (1976); *Brinegar* v. *United States*, 338 U. S. 160, 175–176 (1949). Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest. *Maryland* v. *Pringle*, 540 U. S. 366, 371 (2003). In

this case, the Court of Appeals held that the probable-cause inquiry is further confined to the known facts bearing upon the offense actually invoked at the time of arrest, and that (in addition) the offense supported by these known facts must be "closely related" to the offense that the officer invoked. 333 F. 3d, at 976. We find no basis in precedent or reason for this limitation.

Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. See *Whren* v. *United States*, 517 U. S. 806, 812–813 (1996) (reviewing cases); *Arkansas* v. *Sullivan*, 532 U. S. 769 (2001) *(per curiam)*. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, "'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" *Whren*, *supra*, at 813 (quoting *Scott* v. *United States*, 436 U. S. 128, 138 (1978)). "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Whren*, *supra*, at 814. "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton* v. *California*, 496 U. S. 128, 138 (1990).

The rule that the offense establishing probable cause must be "closely related" to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent with this precedent.[2] Such a rule

[2] At least one Court of Appeals has adopted a variation of the "closely related offense" rule which looks not to the offense stated by the officer at the time of arrest, but to the offense given by the officer at booking. See *Gassner* v. *Garland*, 864 F. 2d 394, 398 (CA5 1989); but see *Sheehy* v.

makes the lawfulness of an arrest turn upon the motivation of the arresting officer—eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest, and offenses that are not "closely related" to that subjective reason. See, *e. g.*, *Sheehy* v. *Plymouth*, 191 F. 3d 15, 20 (CA1 1999); *Trejo* v. *Perez*, 693 F. 2d 482, 485–486 (CA5 1982). This means that the constitutionality of an arrest under a given set of known facts will "vary from place to place and from time to time," *Whren*, *supra*, at 815, depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists. An arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection.

Those who support the "closely related offense" rule say that, although it is aimed at rooting out the subjective vice of arrests made for the wrong reason, it does so by objective means—that is, by reference to the arresting officer's statement of his reason. The same argument was made in *Whren*, *supra*, in defense of the proposed rule that a traffic stop can be declared invalid for malicious motivation when it is justified only by an offense which standard police practice does not make the basis for a stop. That rule, it was said, "attempt[s] to root out subjective vices through objective means," *id.*, at 814. We rejected the argument there, and we reject it again here. Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply

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Plymouth, 191 F. 3d 15, 20 (CA1 1999) (holding that an arrest *cannot* be justified by an offense given at booking when the offense asserted by the officer at the time of arrest was not closely related). Most of our discussion in this opinion, and our conclusion of invalidity, applies to this variation as well.

no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.

Finally, the "closely related offense" rule is condemned by its perverse consequences. While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required.[3] Hence, the predictable consequence of a rule limiting the probable-cause inquiry to offenses closely related to (and supported by the same facts as) those identified by the arresting officer is not, as respondent contends, that officers will cease making sham arrests on the hope that such arrests will later be validated, but rather that officers will cease providing reasons for arrest. And even if this option were to be foreclosed by adoption of a statutory or constitutional requirement, officers would simply give every reason for which probable cause could conceivably exist.

The facts of this case exemplify the arbitrary consequences of a "closely related offense" rule. Officer Haner's initial stop of respondent was motivated entirely by the suspicion that he was impersonating a police officer. App. 106. Before pulling respondent over, Haner indicated by radio that this was his concern; during the stop, Haner asked respondent whether he was actively employed in law enforcement and why his car had wig-wag headlights; and when Sergeant Devenpeck arrived, Haner told him why he thought respondent was a "wannabe cop," *id.*, at 98. In addition, in the course of interrogating respondent, both officers became convinced that he was not answering their questions truthfully and, with respect to the wig-wag headlights, that he

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[3] Even absent a requirement that an individual be informed of the reason for arrest when he is taken into custody, he will not be left to wonder for long. "[P]ersons arrested without a warrant must promptly be brought before a neutral magistrate for a judicial determination of probable cause." *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 53 (1991).

was affirmatively trying to mislead them. Only after these suspicions had developed did Devenpeck discover the taping, place respondent under arrest, and offer the Privacy Act as the reason. Because of the "closely related offense" rule, Devenpeck's actions render irrelevant both Haner's developed suspicions that respondent was impersonating a police officer and the officers' shared belief that respondent obstructed their investigation. The outcome under the "closely related offense" rule might well have been different if Haner, rather than Devenpeck, had made the arrest, on the stated basis of *his* suspicions; if Devenpeck had not abided the county's policy against stacking charges; or if either officer had made the arrest without stating the grounds. We have consistently rejected a conception of the Fourth Amendment that would produce such haphazard results. See *Whren*, 517 U. S., at 815.

* * *

Respondent contended below that petitioners lacked probable cause to arrest him for obstructing a law-enforcement officer or for impersonating a law-enforcement officer. Because the Court of Appeals held that those offenses were legally irrelevant, it did not decide the question. We decline to engage in this inquiry for the first time here. Accordingly, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

Syllabus

COOPER INDUSTRIES, INC. *v.* AVIALL SERVICES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02–1192. Argued October 6, 2004—Decided December 13, 2004

The enabling clause of § 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as added by the Superfund Amendments and Reauthorization Act of 1986 (SARA), provides that any person "may" seek contribution from any other person liable or potentially liable under CERCLA § 107(a) "during or following any civil action" under CERCLA § 106 (which authorizes the Federal Government to compel responsible parties to clean up contaminated areas, see *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 814), or CERCLA § 107(a) (which empowers the Government to recover its response costs from potentially responsible persons (PRPs)). Section 113(f)(1)'s saving clause provides: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under" § 106 or § 107. SARA also created a separate express right of contribution, § 113(f)(3)(B), for "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement."

Cooper Industries, Inc., owned four Texas properties until 1981, when it sold them to Aviall Services, Inc. After operating those sites for several years, Aviall discovered that both it and Cooper had contaminated them when hazardous substances leaked into the ground and ground water. Aviall notified the State of the contamination, but neither the State nor the Federal Government took judicial or administrative measures to compel cleanup. Aviall cleaned up the properties under the State's supervision and sold them to a third party, but remains contractually responsible for $5 million or more in cleanup costs. Aviall filed this action against Cooper to recover such costs. The original complaint asserted, *inter alia*, a claim for cost recovery under § 107(a) and a separate claim for contribution under § 113(f)(1). Aviall later amended the complaint to, among other things, combine its two CERCLA claims into a single, joint claim that, pursuant to § 113(f)(1), sought contribution from Cooper as a PRP under § 107(a). Granting Cooper summary judgment, the District Court held that Aviall had abandoned its freestanding § 107 claim, and that contribution under

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§ 113(f)(1) was unavailable because Aviall had not been sued under § 106 or § 107. The Fifth Circuit ultimately reversed, holding that § 113(f)(1) allows a PRP to obtain contribution from other PRPs regardless of whether the PRP has been sued under § 106 or § 107. The court reasoned in part that "may" in § 113(f)(1)'s enabling clause did not mean "may only."

Held: A private party who has not been sued under CERCLA § 106 or § 107(a) may not obtain contribution under § 113(f)(1) from other liable parties. Pp. 165–171.

(a) Section 113(f)(1) does not authorize Aviall's suit. This Court disagrees with Aviall's argument that the word "may" in § 113(f)(1)'s enabling clause should be read permissively, such that "during or following" a civil action is one, but not the exclusive, instance in which a person may seek contribution. First, the natural meaning of "may" in this context is that it authorizes certain contribution actions that satisfy the subsequent specified condition—*i. e.*, those that occur "during or following" a specified civil action—and no others. Second, reading § 113(f)(1) to authorize contribution actions at any time, regardless of the existence of a § 106 or § 107(a) civil action, would render entirely superfluous the section's explicit "during or following" condition, as well as § 113(f)(3)(B), which permits contribution actions after settlement. This Court is loath to allow such a reading. See, *e. g.*, *Hibbs* v. *Winn*, 542 U. S. 88, 101. Congress would not have bothered to specify conditions under which a person may bring a contribution claim, and at the same time allowed contribution actions absent those conditions. Section 113(f)(1)'s saving clause does not change the Court's conclusion. That clause's sole function is to clarify that § 113(f)(1) does nothing to "diminish" any cause(s) of action for contribution that may exist independently of § 113(f)(1), thereby rebutting any presumption that the express right of contribution provided by the enabling clause is the exclusive contribution cause of action available to a PRP. The saving clause, however, does not itself establish a cause of action, nor expand § 113(f)(1) to authorize contribution actions not brought "during or following" a § 106 or § 107(a) civil action, nor specify what causes of action for contribution, if any, exist outside § 113(f)(1). Reading the clause to authorize § 113(f)(1) contribution actions not just "during or following" a civil action, but also before such an action, would again violate the settled rule that the Court must, if possible, construe a statute to give every word some operative effect. In light of provisions specifying two 3-year limitations periods for contribution actions beginning at the date of judgment, § 113(g)(3)(A), and at the date of settlement, § 113(g)(3)(B), the absence of any such provision for cases in which a

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judgment or settlement never occurs also supports the conclusion that, to assert a contribution claim under § 113(f), a party must satisfy the conditions of either § 113(f)(1) or § 113(f)(3)(B). Given the clear meaning of CERCLA's text, there is no need to resolve the parties' dispute about CERCLA's purpose or to consult that purpose at all. See *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79. Because Aviall has never been subject to a civil action under § 106 or § 107(a), it has no § 113(f)(1) claim. Pp. 165–168.

(b) The Court declines to address in the first instance Aviall's claim that it may recover costs under § 107(a)(4)(B) even though it is a PRP. In view of the importance of the § 107 issue, the question whether Aviall waived a freestanding § 107 claim, and the absence of briefing and decisions by the courts below, this Court is not prepared to resolve the § 107 question solely on the basis of dictum in *Key Tronic*. Pp. 168–170.

(c) In addition, the Court declines to decide whether Aviall has an implied right to contribution under § 107. To the extent that Aviall chooses to frame its § 107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery), the Court notes that it has visited the subject before, see, *e. g.*, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 638–647, and that, in enacting § 113(f)(1), Congress explicitly recognized a particular set (claims "during or following" the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law, cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19. Pp. 170–171.

312 F. 3d 677, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 171.

William Bradford Reynolds argued the cause for petitioner. With him on the briefs were *Lisa K. Hsiao, Dale E. Stephenson*, and *Allen A. Kacenjar.*

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Solicitor General Olson, Assistant Attorney General Sansonetti, Deputy Solicitor General Hungar, Deputy Assistant Attorney General Clark*, and *Paul S. Weiland.*

Richard O. Faulk argued the cause for respondent. With him on the brief were *Cynthia J. Bishop, Jeffrey M. Gaba, Walter Dellinger,* and *Pamela Harris.**

JUSTICE THOMAS delivered the opinion of the Court.

Section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[1] allows persons who have undertaken efforts to clean up properties contaminated by hazardous substances to seek contribution from other parties liable under CERCLA. Section 113(f)(1) specifies that a party may obtain contribution "during or following any civil action" under CERCLA § 106 or § 107(a). The issue we must decide is whether a

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*Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eliot Spitzer,* Attorney General of New York, *Caitlin J. Halligan,* Solicitor General, *Robert H. Easton,* Assistant Solicitor General, and *Peter H. Lehner, Karen R. Kaufmann,* and *Gordon J. Johnson,* Assistant Attorneys General, by *Anabelle Rodríguez,* Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Lisa Madigan* of Illinois, *Charles C. Foti, Jr.,* of Louisiana, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Brian Sandoval* of Nevada, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Gerald J. Pappert* of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Paul G. Summers* of Tennessee, *Christine O. Gregoire* of Washington, *Peggy A. Lautenschlager* of Wisconsin, and *Patrick J. Crank* of Wyoming; for Atlantic Richfield Co. et al. by *Joel M. Gross* and *Albert M. Cohen;* for ConocoPhillips Co. et al. by *Richard P. Bress, John McGahren, David H. Becker,* and *David L. Mulliken;* for Lockheed Martin Corp. by *Miguel A. Estrada, Andrew S. Tulumello,* and *James R. Buckley;* and for the Superfund Settlements Project et al. by *Michael W. Steinberg, Harry M. Ng, Ralph J. Colleli, Jr., Kenneth R. Meade, William R. Weissman,* and *Paul D. Ackerman.*

[1] Section 113(f)(1) is codified at 42 U. S. C. § 9613(f)(1). We refer throughout, for the most part, to sections of CERCLA rather than the U. S. Code.

private party who has not been sued under § 106 or § 107(a) may nevertheless obtain contribution under § 113(f)(1) from other liable parties. We hold that it may not.

I

Under CERCLA, 94 Stat. 2767, the Federal Government may clean up a contaminated area itself, see § 104, or it may compel responsible parties to perform the cleanup, see § 106(a). See *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 814 (1994). In either case, the Government may recover its response costs under § 107, 42 U. S. C. § 9607 (2000 ed. and Supp. I), the "cost recovery" section of CERCLA. Section 107(a) lists four classes of potentially responsible persons (PRPs) and provides that they "shall be liable" for, among other things, "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan." § 107(a)(4)(A).[2] Section 107(a) further provides that PRPs shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." § 107(a)(4)(B).

After CERCLA's enactment in 1980, litigation arose over whether § 107, in addition to allowing the Government and certain private parties to recover costs from PRPs, also allowed a PRP that had incurred response costs to recover costs from other PRPs. More specifically, the question was whether a private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs. Various courts held that § 107(a)(4)(B) and its predecessors authorized such a cause of action. See, *e. g.*, *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F. 2d 887, 890–892

[2] The national contingency plan specifies procedures for preparing and responding to contaminations and was promulgated by the Environmental Protection Agency (EPA) pursuant to CERCLA § 105, 42 U. S. C. § 9605 (2000 ed. and Supp. I). The plan is codified at 40 CFR pt. 300 (2004).

(CA9 1986); *Walls* v. *Waste Resource Corp.*, 761 F. 2d 311, 317–318 (CA6 1985); *Philadelphia* v. *Stepan Chemical Co.*, 544 F. Supp. 1135, 1140–1143 (ED Pa. 1982).

After CERCLA's passage, litigation also ensued over the separate question whether a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution from other PRPs. As originally enacted in 1980, CERCLA contained no provision expressly providing for a right of action for contribution. A number of District Courts nonetheless held that, although CERCLA did not mention the word "contribution," such a right arose either impliedly from provisions of the statute, or as a matter of federal common law. See, *e. g.*, *United States* v. *New Castle County*, 642 F. Supp. 1258, 1263–1269 (Del. 1986) (contribution right arises under federal common law); *Colorado* v. *ASARCO, Inc.*, 608 F. Supp. 1484, 1486–1493 (Colo. 1985) (same); *Wehner* v. *Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (ED Mo. 1985) (contribution right is implied from § 107(e)(2)). That conclusion was debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other federal statutes. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 638–647 (1981) (refusing to recognize implied or common-law right to contribution in the Sherman Act or the Clayton Act); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 90–99 (1981) (refusing to recognize implied or common-law right to contribution in the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964).

Congress subsequently amended CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (SARA), 100 Stat. 1613, to provide an express cause of action for contribution, codified as CERCLA § 113(f)(1):

> "Any person may seek contribution from any other person who is liable or potentially liable under section

> 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title." *Id.*, at 1647, as codified in 42 U. S. C. § 9613(f)(1).

SARA also created a separate express right of contribution, § 113(f)(3)(B), for "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." In short, after SARA, CERCLA provided for a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances, §§ 113(f)(1), 113(f)(3)(B).[3]

II

This case concerns four contaminated aircraft engine maintenance sites in Texas. Cooper Industries, Inc., owned and operated those sites until 1981, when it sold them to Aviall Services, Inc. Aviall operated the four sites for a number of years. Ultimately, Aviall discovered that both it and Cooper had contaminated the facilities when petroleum

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[3] In *Key Tronic Corp.* v. *United States*, 511 U. S. 809 (1994), we observed that §§ 107 and 113 created "similar and somewhat overlapping" remedies. *Id.*, at 816. The cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 113(f)(1) are similar at a general level in that they both allow private parties to recoup costs from other private parties. But the two remedies are clearly distinct.

and other hazardous substances leaked into the ground and ground water through underground storage tanks and spills.

Aviall notified the Texas Natural Resource Conservation Commission (Commission) of the contamination. The Commission informed Aviall that it was violating state environmental laws, directed Aviall to clean up the site, and threatened to pursue an enforcement action if Aviall failed to undertake remediation. Neither the Commission nor the EPA, however, took judicial or administrative measures to compel cleanup.

Aviall cleaned up the properties under the State's supervision, beginning in 1984. Aviall sold the properties to a third party in 1995 and 1996, but remains contractually responsible for the cleanup. Aviall has incurred approximately $5 million in cleanup costs; the total costs may be even greater. In August 1997, Aviall filed this action against Cooper in the United States District Court for the Northern District of Texas, seeking to recover cleanup costs. The original complaint asserted a claim for cost recovery under CERCLA § 107(a), a separate claim for contribution under CERCLA § 113(f)(1), and state-law claims. Aviall later amended the complaint, combining its two CERCLA claims into a single, joint CERCLA claim. That claim alleged that, pursuant to § 113(f)(1), Aviall was entitled to seek contribution from Cooper, as a PRP under § 107(a), for response costs and other liability Aviall incurred in connection with the Texas facilities.[4] Aviall continued to assert state-law claims as well.

Both parties moved for summary judgment, and the District Court granted Cooper's motion. The court held that

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[4] Aviall asserts that it framed its claim in the manner compelled by Fifth Circuit precedent holding that a § 113 claim is a type of § 107 claim. *Geraghty & Miller, Inc.* v. *Conoco Inc.*, 234 F. 3d 917, 924 (2000); see also, *e. g., Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F. 3d 344, 349–353 (CA6 1998); *Sun Co., Inc.* v. *Browning-Ferris, Inc.*, 124 F. 3d 1187, 1191 (CA10 1997); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F. 3d 1298, 1301–1302 (CA9 1997).

Aviall, having abandoned its § 107 claim, sought contribution only under § 113(f)(1). The court held that § 113(f)(1) relief was unavailable to Aviall because it had not been sued under CERCLA § 106 or § 107. Having dismissed Aviall's federal claim, the court declined to exercise jurisdiction over the state-law claims.

A divided panel of the Court of Appeals for the Fifth Circuit affirmed. 263 F. 3d 134 (2001). The majority, relying principally on the "during or following" language in the first sentence of § 113(f)(1), held that "a PRP seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it." *Id.*, at 145. The dissent reasoned that the final sentence of § 113(f)(1), the saving clause, clarified that the federal common-law right to contribution survived the enactment of § 113(f)(1), even absent a § 106 or § 107(a) civil action. *Id.*, at 148–150 (opinion of Wiener, J.).

On rehearing en banc, the Fifth Circuit reversed by a divided vote, holding that § 113(f)(1) allows a PRP to obtain contribution from other PRPs regardless of whether the PRP has been sued under § 106 or § 107. 312 F. 3d 677 (2002). The court held that "[s]ection 113(f)(1) authorizes suits against PRPs in both its first and last sentence[,] which states without qualification that 'nothing' in the section shall 'diminish' any person's right to bring a contribution action in the absence of a section 106 or section 107(a) action." *Id.*, at 681. The court reasoned in part that "may" in § 113(f)(1) did not mean "may only." *Id.*, at 686–687. Three members of the en banc court dissented for essentially the reasons given by the panel majority. *Id.*, at 691–693 (opinion of Garza, J.). We granted certiorari, 540 U. S. 1099 (2004), and now reverse.

III

A

Section 113(f)(1) does not authorize Aviall's suit. The first sentence, the enabling clause that establishes the right

of contribution, provides: "Any person *may* seek contribution . . . *during or following* any civil action under section 9606 of this title or under section 9607(a) of this title," 42 U. S. C. § 9613(f)(1) (emphasis added). The natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, "during or following" a specified civil action.

Aviall answers that "may" should be read permissively, such that "during or following" a civil action is one, but not the exclusive, instance in which a person may seek contribution. We disagree. First, as just noted, the natural meaning of "may" in the context of the enabling clause is that it authorizes certain contribution actions—ones that satisfy the subsequent specified condition—and no others.

Second, and relatedly, if § 113(f)(1) were read to authorize contribution actions at any time, regardless of the existence of a § 106 or § 107(a) civil action, then Congress need not have included the explicit "during or following" condition. In other words, Aviall's reading would render part of the statute entirely superfluous, something we are loath to do. See, *e. g.*, *Hibbs* v. *Winn*, 542 U. S. 88, 101 (2004). Likewise, if § 113(f)(1) authorizes contribution actions at any time, § 113(f)(3)(B), which permits contribution actions after settlement, is equally superfluous. There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions.

The last sentence of § 113(f)(1), the saving clause, does not change our conclusion. That sentence provides: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title." 42 U. S. C. § 9613(f)(1). The sole function of the sentence is to clarify that § 113(f)(1) does nothing to "diminish" any cause(s) of action for contribution that may exist independently of § 113(f)(1). In other words, the sentence re-

buts any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP. The sentence, however, does not itself establish a cause of action; nor does it expand § 113(f)(1) to authorize contribution actions not brought "during or following" a § 106 or § 107(a) civil action; nor does it specify what causes of action for contribution, if any, exist outside § 113(f)(1). Reading the saving clause to authorize § 113(f)(1) contribution actions not just "during or following" a civil action, but also before such an action, would again violate the settled rule that we must, if possible, construe a statute to give every word some operative effect. See *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 35–36 (1992).

Our conclusion follows not simply from § 113(f)(1) itself, but also from the whole of § 113. As noted above, § 113 provides two express avenues for contribution: § 113(f)(1) ("during or following" specified civil actions) and § 113(f)(3)(B) (after an administrative or judicially approved settlement that resolves liability to the United States or a State). Section 113(g)(3) then provides two corresponding 3-year limitations periods for contribution actions, one beginning at the date of judgment, § 113(g)(3)(A), and one beginning at the date of settlement, § 113(g)(3)(B). Notably absent from § 113(g)(3) is any provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup. The lack of such a provision supports the conclusion that, to assert a contribution claim under § 113(f), a party must satisfy the conditions of either § 113(f)(1) or § 113(f)(3)(B).

Each side insists that the purpose of CERCLA bolsters its reading of § 113(f)(1). Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all. As we have said: "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *On-*

cale v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79 (1998). Section 113(f)(1), 100 Stat. 1647, authorizes contribution claims only "during or following" a civil action under § 106 or § 107(a), and it is undisputed that Aviall has never been subject to such an action.[5] Aviall therefore has no § 113(f)(1) claim.

B

Aviall and *amicus* Lockheed Martin contend that, in the alternative to an action for contribution under § 113(f)(1), Aviall may recover costs under § 107(a)(4)(B) even though it is a PRP. The dissent would have us so hold. We decline to address the issue. Neither the District Court, nor the Fifth Circuit panel, nor the Fifth Circuit sitting en banc considered Aviall's § 107 claim. In fact, as noted above, Aviall included separate § 107 and § 113 claims in its original complaint, but then asserted a "combined" § 107/§ 113 claim in its amended complaint. The District Court took this consolidated claim to mean that Aviall was relying on § 107 "not as an independent cause of action," but only "to the extent necessary to maintain a viable § 113(f)(1) contribution claim." Civ. Action No. 3:97–CV–1926–D (ND Tex., Jan. 13, 2000), App. to Pet. for Cert. 94a, n. 2. Consequently the court saw no need to address any freestanding § 107 claim. The Fifth Circuit panel likewise concluded that Aviall no longer advanced a stand-alone § 107 claim. 263 F. 3d, at 137, n. 2. The en banc court found it unnecessary to decide whether Aviall had waived the § 107 claim, because it held that Aviall could rely instead on § 113. 312 F. 3d, at 685, n. 15. Thus, the court did not address the waiver issue, let alone the merits of the § 107 claim.

"We ordinarily do not decide in the first instance issues not decided below." *Adarand Constructors, Inc.* v. *Mineta*,

[5] Neither has Aviall been subject to an administrative order under § 106; thus, we need not decide whether such an order would qualify as a "civil action under section 9606 . . . or under section 9607(a)" of CERCLA. 42 U. S. C. § 9613(f)(1).

534 U. S. 103, 109 (2001) *(per curiam)* (internal quotation marks omitted). Although we have deviated from this rule in exceptional circumstances, *United States* v. *Mendenhall*, 446 U. S. 544, 551–552, n. 5 (1980), the circumstances here cut *against* resolving the § 107 claim. Both the question whether Aviall has waived this claim and the underlying § 107 question (if it is not waived) may depend in part on the relationship between §§ 107 and 113. That relationship is a significant issue in its own right. It is also well beyond the scope of the briefing and, indeed, the question presented, which asks simply whether a private party "may bring an action seeking contribution pursuant to CERCLA Section 113(f)(1)." Pet. for Cert. i. The § 107 claim and the preliminary waiver question merit full consideration by the courts below.

Furthermore, the parties cite numerous decisions of the Courts of Appeals as holding that a private party that is itself a PRP may not pursue a § 107(a) action against other PRPs for joint and several liability. See, *e. g.*, *Bedford Affiliates* v. *Sills*, 156 F. 3d 416, 423–424 (CA2 1998); *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F. 3d 344, 349–356 (CA6 1998); *Pneumo Abex Corp.* v. *High Point, T. & D. R. Co.*, 142 F. 3d 769, 776 (CA4 1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F. 3d 1298, 1301–1306 (CA9 1997); *New Castle County* v. *Halliburton NUS Corp.*, 111 F. 3d 1116, 1120–1124 (CA3 1997); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F. 3d 1489, 1496, and n. 7 (CA11 1996); *United States* v. *Colorado & E. R. Co.*, 50 F. 3d 1530, 1534–1536 (CA10 1995); *United Technologies Corp.* v. *Browning-Ferris Industries*, 33 F. 3d 96, 98–103 (CA1 1994). To hold here that Aviall may pursue a § 107 action, we would have to consider whether these decisions are correct, an issue that Aviall has flagged but not briefed. And we might have to consider other issues, also not briefed, such as whether Aviall, which seeks to recover the share of its cleanup costs fairly chargeable to Cooper, may pursue a § 107

cost recovery action for some form of liability other than joint and several. We think it more prudent to withhold judgment on these matters.

In view of the importance of the § 107 issue and the absence of briefing and decisions by the courts below, we are not prepared—as the dissent would have it—to resolve the § 107 question solely on the basis of dictum in *Key Tronic*. We held there that certain attorney's fees were not "'necessary costs of response'" within the meaning of § 107(a)(4)(B). 511 U. S., at 818–821. But we did not address the relevance, if any, of Key Tronic's status as a PRP or confront the relationship between §§ 107 and 113. In discussing § 107, we did not even classify it precisely as a right of cost recovery or a right of contribution, as the dissent's descriptions of the decision reveal. *Post*, at 172 (opinion of GINSBURG, J.) (describing *Key Tronic* as recognizing a right to "'seek recovery of cleanup costs'" (quoting 511 U. S., at 818), but in the following paragraph saying that *Key Tronic* identified a "right to contribution"). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U. S. 507, 511 (1925). Aviall itself recognizes the need for fuller examination of the § 107 claim; it has simply requested that we remand for consideration of that claim, not that we resolve the claim in the first instance.

C

In addition to leaving open whether Aviall may seek cost recovery under § 107, Part III–B, *supra*, we decline to decide whether Aviall has an implied right to contribution under § 107. Portions of the Fifth Circuit's opinion below might be taken to endorse the latter cause of action, 312 F. 3d, at 687; others appear to reserve the question whether such a cause of action exists, *id.*, at 685, n. 15. To the extent that Aviall chooses to frame its § 107 claim on remand as an im-

plied right of contribution (as opposed to a right of cost recovery),[6] we note that this Court has visited the subject of implied rights of contribution before. See *Texas Industries*, 451 U. S., at 638–647; *Northwest Airlines*, 451 U. S., at 90–99. We also note that, in enacting § 113(f)(1), Congress explicitly recognized a particular set (claims "during or following" the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law. Cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19 (1979). Nonetheless, we need not and do not decide today whether any judicially implied right of contribution survived the passage of SARA.

* * *

We hold only that § 113(f)(1) does not support Aviall's suit. We therefore reverse the judgment of the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, dissenting.

Aviall Services, Inc., purchased from Cooper Industries, Inc., property that was contaminated with hazardous substances. Shortly after the purchase, the Texas Natural Resource Conservation Commission notified Aviall that it would institute enforcement action if Aviall failed to remediate the property. Aviall promptly cleaned up the site and now seeks reimbursement from Cooper. In my view, the Court unnecessarily defers decision on Aviall's entitlement to recover cleanup costs from Cooper.

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[6] As noted above, we do not address whether a § 107 cost recovery action by Aviall (if not waived) may seek some form of liability other than joint and several.

In *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 818 (1994), all Members of this Court agreed that § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U. S. C. § 9607, "unquestionably provides a cause of action for [potentially responsible persons (PRPs)] to seek recovery of cleanup costs." The Court rested that determination squarely and solely on § 107(a)(4)(B), which allows *any* person who has incurred costs for cleaning up a hazardous waste site to recover all or a portion of those costs from any other person liable under CERCLA.[1]

The *Key Tronic* Court divided, however, on the question whether the right to contribution is implicit in § 107(a)'s text, as the majority determined, or whether § 107(a) expressly confers the right, as the dissenters urged. The majority stated: Section 107 "*implies*—but does not expressly *command*—that [a PRP] may have a claim for contribution against those treated as joint tortfeasors." 511 U. S., at 818, and n. 11 (emphasis added). The dissent maintained: "Section 107(a)(4)(B) states, as clearly as can be, that '[c]overed persons . . . shall be liable for . . . necessary costs of response incurred by any other person.' Surely to say that A shall be liable to B is the *express* creation of a right of action." *Id.*, at 822. But no Justice expressed the slightest doubt that § 107 indeed did enable a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred.

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[1] Key Tronic, a PRP, asserted a cost-recovery claim under § 107(a) to recoup approximately $1.2 million in costs that it allegedly incurred cleaning up its site "at its own initiative." *Key Tronic Corp.* v. *United States*, 984 F. 2d 1025, 1026 (CA9 1993). Although Key Tronic settled a portion of its liability with the Environmental Protection Agency (EPA), the claim advanced in Key Tronic's § 107(a) suit rested on remedial action taken before the EPA's involvement, remediation that did not figure in the settlement. *Id.*, at 1026–1027; *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 811–812 (1994).

In its original complaint, Aviall identified § 107 as the federal-law basis for an independent cost-recovery claim against Cooper, and § 113 as the basis for a contribution claim. App. 8A, 16A–17A. In amended pleadings, Aviall alleged both §§ 107 and 113 as the federal underpinning for its contribution claim. *Id.*, at 27A, 48A. Aviall's use of §§ 113 and 107 in tandem to assert a contribution claim conformed its pleading to then-governing Fifth Circuit precedent, which held that a CERCLA contribution action arises through the joint operation of §§ 107(a) and 113(f)(1). See *Geraghty & Miller, Inc.* v. *Conoco Inc.*, 234 F. 3d 917, 924 (2000) ("[W]hile section 113(f) is the vehicle for bringing a contribution action, it does not create a new cause of action or create any new liabilities. Rather, it is a mechanism for apportioning costs that are recoverable under section 107." (footnote omitted)). A party obliged by circuit precedent to plead in a certain way can hardly be deemed to have waived a plea the party could have maintained had the law of the circuit permitted him to do so. But cf. *ante*, at 168–169.

In the Fifth Circuit's view, § 107 supplied the right of action for Aviall's claim, and § 113(f)(1) prescribed the procedural framework. 312 F. 3d 677, 683, and n. 10 (2002) (en banc) (stating that § 107 "impliedly authorizes a cause of action for contribution" and § 113(f) "govern[s] and regulate[s]" the action (citing *Geraghty & Miller*, 234 F. 3d, at 924; internal quotation marks omitted)); see § 113(f)(1) (calling for the governance of "Federal law" and the application of "the Federal Rules of Civil Procedure," and specifying that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate"). Notably, Aviall expressly urged in the Court of Appeals that, were the court to conclude that § 113(f)(1)'s "during or following" language excluded application of that section to this case, Aviall's suit should be adjudicated independently under § 107(a). See Response of Appellant Aviall Services, Inc., to the *Amicus*

Curiae Brief for United States in No. 00–10197 (CA5), p. 24 ("[P]arties who are excluded from seeking contribution under section 113(f)(1) must therefore have available to them the broader right of cost recovery [covering both full recovery and contribution] under section 107(a)."); cf. *Key Tronic*, 511 U. S., at 816 ("[T]he statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.").

I see no cause for protracting this litigation by requiring the Fifth Circuit to revisit a determination it has essentially made already: Federal courts, prior to the enactment of § 113(f)(1), had correctly held that PRPs could "recover [under § 107] a proportionate share of their costs in actions for contribution against other PRPs," 312 F. 3d, at 687;[2] nothing in § 113 retracts that right, *ibid.* (noting that § 113(f)'s saving clause preserves all preexisting state and federal rights of action for contribution, including the § 107 implied right this Court recognized in *Key Tronic*, 511 U. S., at 816). Accordingly, I would not defer a definitive ruling by this Court on the question whether Aviall may pursue a § 107 claim for relief against Cooper.

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[2] The cases to which the Court refers, *ante*, at 171, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630 (1981), and *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77 (1981), do not address the implication of a right of action for contribution under CERCLA. *Texas Industries* concerned the Sherman and Clayton Acts, 451 U. S., at 639–646; *Northwest Airlines*, the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, 451 U. S., at 90–99. A determination suitable in one statutory context does not necessarily carry over to a different statutory setting.

Syllabus

FLORIDA *v.* NIXON

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 03–931. Argued November 2, 2004—Decided December 13, 2004

Respondent Nixon was arrested for a brutal murder. Questioned by the police, Nixon described in graphic detail how he had kidnaped and killed his victim. After gathering overwhelming evidence of his guilt, the State indicted Nixon for first-degree murder and related crimes. Assistant public defender Corin, assigned to represent Nixon, filed a plea of not guilty and deposed all of the State's potential witnesses. Satisfied that Nixon's guilt was not subject to reasonable dispute, Corin commenced plea negotiations, but the prosecutors refused to recommend a sentence other than death. Faced with the inevitability of going to trial on a capital charge, and a strong case for the prosecution, Corin concluded that his best course would be to concede Nixon's guilt, thereby preserving credibility for penalty-phase evidence of Nixon's mental instability, and for defense pleas to spare Nixon's life. Corin several times attempted to explain this strategy to Nixon, but Nixon remained unresponsive, never verbally approving or protesting the proposed strategy. Overall, Nixon gave Corin very little, if any, assistance or direction in preparing the case.

When trial began, Nixon engaged in disruptive behavior and absented himself from most of the proceedings. In his opening statement, Corin acknowledged Nixon's guilt and urged the jury to focus on the penalty phase. During the State's case in chief, Corin objected to the introduction of crime scene photographs as unduly prejudicial, cross-examined witnesses for clarification, and contested several aspects of the jury instructions. In his closing argument, Corin again conceded Nixon's guilt, declaring that he hoped to persuade the jury during the penalty phase that Nixon should not be sentenced to death. The jury found Nixon guilty on all counts. At the penalty phase, Corin argued to the jury that Nixon was not "an intact human being" and had committed the murder while afflicted with multiple mental disabilities. Corin called as witnesses relatives and friends who described Nixon's childhood emotional troubles and his erratic behavior preceding the murder. Corin also presented expert testimony concerning Nixon's antisocial personality, history of emotional instability and psychiatric care, low IQ, and possible brain damage. In his closing argument, Corin emphasized Nixon's youth, the psychiatric evidence, and the jury's discretion to consider any mitigating circumstances; urged that, if not sentenced to

death, Nixon would never be released; maintained that the death penalty was not appropriate for a person with Nixon's impairments; and asked the jury to spare Nixon's life. The jury recommended, and the trial court imposed, the death penalty.

The Florida Supreme Court ultimately reversed, holding that a defense attorney's concession that his client committed murder, made without the defendant's express consent, automatically ranks as prejudicial ineffective assistance of counsel necessitating a new trial under the standard announced in *United States* v. *Cronic*, 466 U. S. 648. Corin's concession, according to that court, was the functional equivalent of a guilty plea in that it allowed the prosecution's guilt-phase case to proceed essentially without opposition. Under *Boykin* v. *Alabama*, 395 U. S. 238, 242–243, consent to a guilty plea cannot be inferred from silence; similarly, the Florida court stated, a concession of guilt at trial requires a defendant's affirmative, explicit acceptance, without which counsel's performance is presumably inadequate. While acknowledging that Nixon was very disruptive and uncooperative at trial and that Corin's strategy may have been in Nixon's best interest, the court nevertheless declared that silent acquiescence is not enough: Counsel conceding a defendant's guilt is inevitably ineffective if the defendant does not expressly approve counsel's course.

Held: Counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial does not automatically render counsel's performance deficient. Pp. 187–193.

(a) The Florida Supreme Court erred in requiring Nixon's affirmative, explicit acceptance of Corin's strategy because it mistakenly deemed Corin's statements to the jury the functional equivalent of a guilty plea. Despite Corin's concession of Nixon's guilt, Nixon retained the rights accorded a defendant in a criminal trial. Cf. 395 U. S., at 242–243, and n. 4. The State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes with which Nixon was charged. That aggressive evidence would thus be separated from the penalty phase, enabling the defense to concentrate that portion of the trial on mitigating factors. Further, the defense reserved the right to cross-examine witnesses for the prosecution and could endeavor, as Corin did, to exclude prejudicial evidence. Futhermore, in the event of errors in the trial or jury instructions, a concession of guilt would not hinder the defendant's right to appeal. Corin was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon. Nixon's characteristic silence each time information was conveyed to him did not suffice to render unreasonable Cor-

in's decision to concede guilt and to home in, instead, on the life or death penalty issue. Pp. 187–189.

(b) Counsel's effectiveness should not be evaluated under the *Cronic* standard, but under the standard prescribed in *Strickland* v. *Washington*, 466 U. S. 668, 688: Did counsel's representation "f[a]ll below an objective standard of reasonableness?" The Florida Supreme Court's erroneous equation of Corin's concession strategy to a guilty plea led it to apply the wrong standard. The court first presumed deficient performance, then applied the presumption of prejudice that *Cronic* reserved for situations in which counsel has entirely failed to function as the client's advocate, 466 U. S., at 659. Corin's concession of Nixon's guilt does not rank as such a failure. *Id.*, at 666. Although a concession of guilt in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies: Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared. Defense counsel must strive at the guilt phase to avoid a counterproductive course. Mounting a "defendant did not commit the crime" defense risks destroying counsel's penalty-phase credibility and may incline the jury against leniency for the defendant. In a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain. Pp. 189–192.

857 So. 2d 172, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which all other Members joined, except REHNQUIST, C. J., who took no part in the decision of the case.

George S. Lemieux, Deputy Attorney General of Florida, argued the cause for petitioner. With him on the briefs were *Charles J. Crist, Jr.*, Attorney General, *Carolyn M.*

Snurkowski, Assistant Deputy Attorney General, and *Curtis M. French*, Senior Assistant Attorney General.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Solicitor General Olson*, *Assistant Attorney General Wray*, *Deputy Solicitor General Dreeben*, and *Sri Srinivasan*.

Edward H. Tillinghast III argued the cause for respondent. With him on the brief was *Eric M. Freedman*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This capital case concerns defense counsel's strategic decision to concede, at the guilt phase of the trial, the defendant's commission of murder, and to concentrate the defense on establishing, at the penalty phase, cause for sparing the defendant's life. Any concession of that order, the Florida Supreme Court held, made without the defendant's express consent—however gruesome the crime and despite the strength of the evidence of guilt—automatically ranks as prejudicial ineffective assistance of counsel necessitating a new trial. We reverse the Florida Supreme Court's judgment.

Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant. See *Strickland* v. *Washington*, 466 U. S. 668, 688 (1984). But when a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course. The reasonableness of counsel's performance, after consultation with the defendant yields no response, must be judged in accord with the inquiry generally applicable to ineffective-assistance-of-counsel claims: Did counsel's representation "f[a]ll below an objective standard of reasonableness"? *Id.*, at 688, 694. The Florida Supreme

**Kent S. Scheidegger* and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Court erred in applying, instead, a presumption of deficient performance, as well as a presumption of prejudice; that latter presumption, we have instructed, is reserved for cases in which counsel fails meaningfully to oppose the prosecution's case. *United States* v. *Cronic*, 466 U. S. 648, 659 (1984). A presumption of prejudice is not in order based solely on a defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with the defendant.

I

On Monday, August 13, 1984, near a dirt road in the environs of Tallahassee, Florida, a passing motorist discovered Jeanne Bickner's charred body. *Nixon* v. *State*, 572 So. 2d 1336, 1337 (Fla. 1990) *(Nixon I)*; 13 Record 2464–2466. Bickner had been tied to a tree and set on fire while still alive. *Id.*, at 2475, 2483–2484. Her left leg and arm, and most of her hair and skin, had been burned away. *Id.*, at 2475–2476. The next day, police found Bickner's car, abandoned on a Tallahassee street corner, on fire. *Id.*, at 2520. Police arrested 23-year-old Joe Elton Nixon later that morning, after Nixon's brother informed the sheriff's office that Nixon had confessed to the murder. *Id.*, at 2559.

Questioned by the police, Nixon described in graphic detail how he had kidnaped Bickner, then killed her.[1] He recounted that he had approached Bickner, a stranger, in a mall, and asked her to help him jump-start his car. 5 *id.*, at 919–921. Bickner offered Nixon a ride home in her 1973 MG sports car. *Id.*, at 922. Once on the road, Nixon directed Bickner to drive to a remote place; en route, he overpowered her and stopped the car. *Id.*, at 924, 926–927. Nixon next put Bickner in the MG's trunk, drove into a wooded area, removed Bickner from the car, and tied her to a tree with

[1] Although Nixon initially stated that he kidnaped Bickner on August 11, the kidnaping and murder in fact occurred on Sunday, August 12, 1984. 20 Record 3768–3770.

jumper cables. *Id.*, at 930–931. Bickner pleaded with Nixon to release her, offering him money in exchange. *Id.*, at 928. Concerned that Bickner might identify him, Nixon decided to kill her. *Id.*, at 929. He set fire to Bickner's personal belongings and ignited her with burning objects. *Id.*, at 934–935. Nixon drove away in the MG, and later told his brother and girlfriend what he had done. *Id.*, at 938, 961. He burned the MG on Tuesday, August 14, after reading in the newspaper that Bickner's body had been discovered. *Id.*, at 963, 982.

The State gathered overwhelming evidence establishing that Nixon had committed the murder in the manner he described. A witness saw Nixon approach Bickner in the mall's parking lot on August 12, and observed Bickner taking jumper cables out of the trunk of her car and giving them to Nixon. 13 *id.*, at 2447–2448, 2450. Several witnesses told police they saw Nixon driving around in the MG in the hours and days following Bickner's death. See *id.*, at 2456, 2487–2488, 2498, 2509. Nixon's palm print was found on the trunk of the car. *Id.*, at 2548–2549. Nixon's girlfriend, Wanda Robinson, and his brother, John Nixon, both stated that Nixon told them he had killed someone and showed them two rings later identified as Bickner's. 5 *id.*, at 971, 987; 13 *id.*, at 2565. According to Nixon's brother, Nixon pawned the rings, 5 *id.*, at 986, and attempted to sell the car, *id.*, at 973. At a local pawnshop, police recovered the rings and a receipt for them bearing Nixon's driver's license number; the pawnshop owner identified Nixon as the person who sold the rings to him. 13 *id.*, at 2568–2569.

In late August 1984, Nixon was indicted in Leon County, Florida, for first-degree murder, kidnaping, robbery, and arson. See App. 1, 55. Assistant public defender Michael Corin, assigned to represent Nixon, see *id.*, at 232, filed a plea of not guilty, *id.*, at 468–469, and deposed all of the State's potential witnesses, *id.*, at 53–58. Corin concluded, given the strength of the evidence, that Nixon's guilt was

not "subject to any reasonable dispute." *Id.*, at 490.[2] Corin thereupon commenced plea negotiations, hoping to persuade the prosecution to drop the death penalty in exchange for Nixon's guilty pleas to all charges. *Id.*, at 336–338, 507. Negotiations broke down when the prosecutors indicated their unwillingness to recommend a sentence other than death. See *id.*, at 339, 508.

Faced with the inevitability of going to trial on a capital charge, Corin turned his attention to the penalty phase, believing that the only way to save Nixon's life would be to present extensive mitigation evidence centering on Nixon's mental instability. *Id.*, at 261, 473; see also *id.*, at 102. Experienced in capital defense, see *id.*, at 248–250, Corin feared that denying Nixon's commission of the kidnaping and murder during the guilt phase would compromise Corin's ability to persuade the jury, during the penalty phase, that Nixon's conduct was the product of his mental illness. See *id.*, at 473, 490, 505. Corin concluded that the best strategy would be to concede guilt, thereby preserving his credibility in urging leniency during the penalty phase. *Id.*, at 458, 505.

Corin attempted to explain this strategy to Nixon at least three times. *Id.*, at 254–255. Although Corin had represented Nixon previously on unrelated charges and the two had a good relationship in Corin's estimation, see *id.*, at 466–467, Nixon was generally unresponsive during their discussions, *id.*, at 478–480. He never verbally approved or protested Corin's proposed strategy. *Id.*, at 234–238, 255, 501. Overall, Nixon gave Corin very little, if any, assistance or direction in preparing the case, *id.*, at 478, and refused to attend pretrial dispositions of various motions, *Nixon I*, 572 So. 2d, at 1341; App. 478. Corin eventually exercised his

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[2] Every court to consider this case, including the judge who presided over Nixon's trial, agreed with Corin's assessment of the evidence. See, *e. g.*, *Nixon* v. *Singletary*, 758 So. 2d 618, 625 (Fla. 2000) *(per curiam)* (evidence of guilt was "overwhelming"); *State* v. *Nixon*, Case No. 84–2324 (Fla. Cir. Ct., Oct. 22, 1997), App. 385; 21 Record 4009–4010.

professional judgment to pursue the concession strategy. As he explained: "There are many times lawyers make decisions because they have to make them because the client does nothing." *Id.*, at 486.

When Nixon's trial began on July 15, 1985, his unresponsiveness deepened into disruptive and violent behavior. On the second day of jury selection, Nixon pulled off his clothing, demanded a black judge and lawyer, refused to be escorted into the courtroom, and threatened to force the guards to shoot him. *Nixon I*, 572 So. 2d, at 1341; 10 Record 1934–1935. An extended on-the-record colloquy followed Nixon's bizarre behavior, during which Corin urged the trial judge to explain Nixon's rights to him and ascertain whether Nixon understood the significance of absenting himself from the trial. Corin also argued that restraining Nixon and compelling him to be present would prejudice him in the eyes of the jury. *Id.*, at 1918–1920. When the judge examined Nixon on the record in a holding cell, Nixon stated he had no interest in the trial and threatened to misbehave if forced to attend. *Id.*, at 1926–1931. The judge ruled that Nixon had intelligently and voluntarily waived his right to be present at trial. *Id.*, at 1938; 11 *id.*, at 2020.

The guilt phase of the trial thus began in Nixon's absence.[3] In his opening statement, Corin acknowledged Nixon's guilt and urged the jury to focus on the penalty phase:

> "In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie Bickner's death. . . . [T]hat fact will be proved to your satisfaction beyond any doubt.
>
> "This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by

[3] Except for a brief period during the second day of the trial, Nixon remained absent throughout the proceedings. See *Nixon I*, 572 So. 2d 1336, 1341–1342 (Fla. 1990); Brief for Petitioner 6, n. 8.

electrocution or maybe its natural expiration after a lifetime of confinement.

. . . . . .

"Now, in arriving at your verdict, in your penalty recommendation, for we will get that far, you are going to learn many facts . . . about Joe Elton Nixon. Some of those facts are going to be good. That may not seem clear to you at this time. But, and sadly, most of the things you learn of Joe Elton Nixon are not going to be good. But, I'm suggesting to you that when you have seen all the testimony, heard all the testimony and the evidence that has been shown, there are going to be reasons why you should recommend that his life be spared." App. 71–72.

During its case in chief, the State introduced the tape of Nixon's confession, expert testimony on the manner in which Bickner died, and witness testimony regarding Nixon's confessions to his relatives and his possession of Bickner's car and personal effects. Corin cross-examined these witnesses only when he felt their statements needed clarification, see, *e. g.*, 13 Record 2504, and he did not present a defense case, 20 *id.*, at 3741. Corin did object to the introduction of crime scene photographs as unduly prejudicial, 13 *id.*, at 2470, and actively contested several aspects of the jury instructions during the charge conference, 11 *id.*, at 2050–2058. In his closing argument, Corin again conceded Nixon's guilt, App. 73, and reminded the jury of the importance of the penalty phase: "I will hope to . . . argue to you and give you reasons not that Mr. Nixon's life be spared one final and terminal confinement forever, but that he not be sentenced to die," *id.*, at 74. The jury found Nixon guilty on all counts.

At the start of the penalty phase, Corin argued to the jury that "Joe Elton Nixon is not normal organically, intellectually, emotionally or educationally or in any other way." *Id.*, at 102. Corin presented the testimony of eight witnesses.

Relatives and friends described Nixon's childhood emotional troubles and his erratic behavior in the days preceding the murder. See, *e. g.*, *id.*, at 108–120. A psychiatrist and a psychologist addressed Nixon's antisocial personality, his history of emotional instability and psychiatric care, his low IQ, and the possibility that at some point he suffered brain damage. *Id.*, at 143–147, 162–166. The State presented little evidence during the penalty phase, simply incorporating its guilt-phase evidence by reference, and introducing testimony, over Corin's objection, that Nixon had removed Bickner's underwear in order to terrorize her. *Id.*, at 105–106.

In his closing argument, Corin emphasized Nixon's youth, the psychiatric evidence, and the jury's discretion to consider any mitigating circumstances, *id.*, at 194–199; Corin urged that, if not sentenced to death, "Joe Elton Nixon would [n]ever be released from confinement," *id.*, at 207. The death penalty, Corin maintained, was appropriate only for "intact human being[s]," and "Joe Elton Nixon is not one of those. He's never been one of those. He never will be one of those." *Id.*, at 209. Corin concluded: "You know, we're not around here all that long. And it's rare when we have the opportunity to give or take life. And you have that opportunity to give life. And I'm going to ask you to do that. Thank you." *Ibid.* After deliberating for approximately three hours, the jury recommended that Nixon be sentenced to death. See 21 Record 4013.

In accord with the jury's recommendation, the trial court imposed the death penalty. *Nixon I*, 572 So. 2d, at 1338. Notably, at the close of the penalty phase, the court commended Corin's performance during the trial, stating that "the tactic employed by trial counsel . . . was an excellent analysis of [the] reality of his case." 21 Record 4009. The evidence of guilt "would have persuaded any jury . . . beyond all doubt," and "[f]or trial counsel to have inferred that Mr. Nixon was not guilty . . . would have deprived [counsel] of any credibility during the penalty phase." *Id.*, at 4010.

On direct appeal to the Florida Supreme Court, Nixon, represented by new counsel, argued that Corin had rendered ineffective assistance by conceding Nixon's guilt without obtaining Nixon's express consent. *Nixon I*, 572 So. 2d, at 1338–1339. Relying on *United States* v. *Cronic*, 466 U. S. 648 (1984), new counsel urged that Corin's concession should be presumed prejudicial because it left the prosecution's case unexposed to "meaningful adversarial testing," *id.*, at 658–659. The Florida Supreme Court remanded for an evidentiary hearing on whether Nixon consented to the strategy, see App. 216–217, but ultimately declined to rule on the matter, finding the evidence of Corin's interactions with Nixon inconclusive, *Nixon I*, 572 So. 2d, at 1340.

In a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 (1999), Nixon renewed his *Cronic*-based "presumption of prejudice" ineffective-assistance-of-counsel claim.[4] After the trial court rejected the claim, *State* v. *Nixon*, Case No. 84–2324 (Cir. Ct., Oct. 22, 1997), App. 389–390, the Florida Supreme Court remanded for a further hearing on Nixon's consent to defense counsel's strategy. *Nixon* v. *Singletary*, 758 So. 2d 618, 625 (2000) *(Nixon II)*. Corin's concession, according to the Florida Supreme Court, was the "functional equivalent of a guilty plea" in that it allowed the prosecution's guilt-phase case to proceed essentially without opposition. *Id.*, at 622–624. Under *Boykin* v. *Alabama*, 395 U. S. 238, 242–243 (1969), a guilty plea cannot be inferred from silence; it must be based on express affirmations made intelligently and voluntarily. Similarly, the Florida Supreme Court stated, a concession of guilt at trial requires a defendant's "affirmative, explicit acceptance," without which counsel's performance is pre-

[4] Nixon contended in the alternative that Corin's decision to concede guilt was unreasonable and prejudicial under the generally applicable standard set out in *Strickland* v. *Washington*, 466 U. S. 668 (1984). App. 385, 389; see *supra*, at 178. Nixon also raised several other challenges to his conviction and sentence. See App. 378–384, 390–392.

sumptively inadequate. *Nixon II*, 758 So. 2d, at 624. The court acknowledged that Nixon was "very disruptive and uncooperative at trial," and that "counsel's strategy may have been in Nixon's best interest." *Id.*, at 625. Nevertheless, the court firmly declared that "[s]ilent acquiescence is not enough," *id.*, at 624; counsel who concedes a defendant's guilt is inevitably ineffective, the court ruled, if the defendant does not expressly approve counsel's course, *id.*, at 625.

On remand, Corin testified that he explained his view of the case to Nixon several times, App. 479–480, and that at each consultation, Nixon "did nothing affirmative or negative," *id.*, at 481–482; see also *id.*, at 486–487. Failing to elicit a definitive response from Nixon, Corin stated, he chose to pursue the concession strategy because, in his professional judgment, it appeared to be "the only way to save [Nixon's] life." *Id.*, at 472. Nixon did not testify at the hearing. The trial court found that Nixon's "natural pattern of communication" with Corin involved passively receiving information, and that Nixon consented to the strategy "through his behavior." *State* v. *Nixon*, Case No. R84–2324AF (Fla. Cir. Ct., Sept. 20, 2001), p. 13; 2 Record 378.

Observing that "no competent, substantial evidence . . . establish[ed] that Nixon *affirmatively* and *explicitly* agreed to counsel's strategy," the Florida Supreme Court reversed and remanded for a new trial. *Nixon* v. *State*, 857 So. 2d 172, 176 (2003) *(Nixon III)* (emphasis in original). Three justices disagreed with the majority's determination that Corin's concession rendered his representation inadequate. *Id.*, at 183 (Lewis, J., concurring in result); *id.*, at 189 (Wells, J., joined by Shaw, S. J., dissenting).

We granted certiorari, 540 U. S. 1217 (2004), to resolve an important question of constitutional law, *i. e.*, whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial automatically renders counsel's performance deficient, and whether coun-

sel's effectiveness should be evaluated under *Cronic* or *Strickland*. We now reverse the judgment of the Florida Supreme Court.

II

An attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy. *Strickland*, 466 U. S., at 688. That obligation, however, does not require counsel to obtain the defendant's consent to "every tactical decision." *Taylor* v. *Illinois*, 484 U. S. 400, 417–418 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval). But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983); *Wainwright* v. *Sykes*, 433 U. S. 72, 93, n. 1 (1977) (Burger, C. J., concurring). Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.

A guilty plea, we recognized in *Boykin* v. *Alabama*, 395 U. S. 238 (1969), is an event of signal significance in a criminal proceeding. By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers. *Id.*, at 243. While a guilty plea may be tactically advantageous for the defendant, *id.*, at 240, the plea is not simply a strategic choice; it is "itself a conviction," *id.*, at 242, and the high stakes for the defendant require "the utmost solicitude," *id.*, at 243. Accordingly, counsel lacks authority to consent to a guilty plea on a client's behalf, *Brookhart* v. *Janis*, 384 U. S. 1, 6–7 (1966); moreover, a defendant's tacit

acquiescence in the decision to plead is insufficient to render the plea valid, *Boykin*, 395 U. S., at 242.

The Florida Supreme Court, as just observed, see *supra*, at 185–186, required Nixon's "affirmative, explicit acceptance" of Corin's strategy because it deemed Corin's statements to the jury "the functional equivalent of a guilty plea." *Nixon II*, 758 So. 2d, at 624. We disagree with that assessment.

Despite Corin's concession, Nixon retained the rights accorded a defendant in a criminal trial. Cf. *Boykin*, 395 U. S., at 242–243, and n. 4 (a guilty plea is "more than a confession which admits that the accused did various acts," it is a "stipulation that no proof by the prosecution need be advanced" (internal quotation marks omitted)). The State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes with which Nixon was charged. That aggressive evidence would thus be separated from the penalty phase, enabling the defense to concentrate that portion of the trial on mitigating factors. See *supra*, at 181, 183–184. Further, the defense reserved the right to cross-examine witnesses for the prosecution and could endeavor, as Corin did, to exclude prejudicial evidence. See *supra*, at 183. In addition, in the event of errors in the trial or jury instructions, a concession of guilt would not hinder the defendant's right to appeal.

Nixon nevertheless urges, relying on *Brookhart* v. *Janis*, that this Court has already extended the requirement of "affirmative, explicit acceptance" to proceedings "surrender[ing] the right to contest the prosecution's factual case on the issue of guilt or innocence." Brief for Respondent 32. Defense counsel in *Brookhart* had agreed to a "prima facie" bench trial at which the State would be relieved of its obligation to put on "complete proof" of guilt or persuade a jury of the defendant's guilt beyond a reasonable doubt. 384 U. S., at 5–6. In contrast to *Brookhart*, there was in Nixon's

case no "truncated" proceeding, *id.*, at 6, shorn of the need to persuade the trier "beyond a reasonable doubt," and of the defendant's right to confront and cross-examine witnesses. While the "prima facie" trial in *Brookhart* was fairly characterized as "the equivalent of a guilty plea," *id.*, at 7, the full presentation to the jury in Nixon's case does not resemble that severely abbreviated proceeding. *Brookhart*, in short, does not carry the weight Nixon would place on it.

Corin was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon. See *supra*, at 181, 186. Given Nixon's constant resistance to answering inquiries put to him by counsel and court, see *Nixon III*, 857 So. 2d, at 187–188 (Wells, J., dissenting), Corin was not additionally required to gain express consent before conceding Nixon's guilt. The two evidentiary hearings conducted by the Florida trial court demonstrate beyond doubt that Corin fulfilled his duty of consultation by informing Nixon of counsel's proposed strategy and its potential benefits. Nixon's characteristic silence each time information was conveyed to him, in sum, did not suffice to render unreasonable Corin's decision to concede guilt and to home in, instead, on the life or death penalty issue.

The Florida Supreme Court's erroneous equation of Corin's concession strategy to a guilty plea led it to apply the wrong standard in determining whether counsel's performance ranked as ineffective assistance. The court first presumed deficient performance, then applied the presumption of prejudice that *United States* v. *Cronic*, 466 U. S. 648 (1984), reserved for situations in which counsel has entirely failed to function as the client's advocate. The Florida court therefore did not hold Nixon to the standard prescribed in *Strickland* v. *Washington*, 466 U. S. 668 (1984), which would have required Nixon to show that counsel's concession strategy was unreasonable. As Florida Supreme Court Justice Lewis observed, that court's majority misunderstood *Cronic* and failed to attend to the realities of defending against a

capital charge. *Nixon III*, 857 So. 2d, at 180–183 (opinion concurring in result).

Cronic recognized a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense. *Cronic* instructed that a presumption of prejudice would be in order in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U. S., at 658. The Court elaborated: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.*, at 659; see *Bell* v. *Cone*, 535 U. S. 685, 696–697 (2002) (for *Cronic*'s presumed prejudice standard to apply, counsel's "failure must be complete"). We illustrated just how infrequently the "surrounding circumstances [will] justify a presumption of ineffectiveness" in *Cronic* itself. In that case, we reversed a Court of Appeals ruling that ranked as prejudicially inadequate the performance of an inexperienced, underprepared attorney in a complex mail fraud trial. 466 U. S., at 662, 666.

On the record thus far developed, Corin's concession of Nixon's guilt does not rank as a "fail[ure] to function in any meaningful sense as the Government's adversary." *Id.*, at 666.[5] Although such a concession in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase

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[5] In his brief before this Court, Nixon describes inconsistencies in the State's evidence at the guilt phase of the trial. See Brief for Respondent 13–22. Corin's failure to explore these inconsistencies, measured against the *Strickland* standard, 466 U. S., at 690, Nixon maintains, constituted ineffective assistance of counsel. The Florida Supreme Court did not address the alleged inconsistencies and we decline to consider the matter in the first instance.

structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 329 (1983).[6] In such cases, "avoiding execution [may be] the best and only realistic result possible." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1040 (2003).

Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course. See Lyon, Defending the Death Penalty Case: What Makes Death Different? 42 Mercer L. Rev. 695, 708 (1991) ("It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the

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[6] As Corin determined here, pleading guilty without a guarantee that the prosecution will recommend a life sentence holds little if any benefit for the defendant. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.2, Commentary (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1045 (2003) ("If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights."). Pleading guilty not only relinquishes trial rights, it increases the likelihood that the State will introduce aggressive evidence of guilt during the sentencing phase, so that the gruesome details of the crime are fresh in the jurors' minds as they deliberate on the sentence. See Goodpaster, 58 N. Y. U. L. Rev., at 331; *supra*, at 184, 188.

client and, in essence, the attorney."); Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 Cornell L. Rev. 1557, 1589–1591 (1998) (interviews of jurors in capital trials indicate that juries approach the sentencing phase "cynically" where counsel's sentencing-phase presentation is logically inconsistent with the guilt-phase defense); *id.*, at 1597 (in capital cases, a "run-of-the-mill strategy of challenging the prosecution's case for failing to prove guilt beyond a reasonable doubt" can have dire implications for the sentencing phase). In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in "a useless charade." See *Cronic*, 466 U. S., at 656–657, n. 19. Renowned advocate Clarence Darrow, we note, famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold. Imploring the judge to spare the boys' lives, Darrow declared: "I do not know how much salvage there is in these two boys. . . . I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large." Attorney for the Damned: Clarence Darrow in the Courtroom 84 (A. Weinberg ed. 1989); see Tr. of Oral Arg. 40–41 (Darrow's clients "did not expressly consent to what he did. But he saved their lives."); cf. *Yarborough* v. *Gentry*, 540 U. S. 1, 9–10 (2003) *(per curiam)*.

To summarize, in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

* * *

For the reasons stated, the judgment of the Florida Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

Per Curiam

BROSSEAU *v.* HAUGEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1261. Decided December 13, 2004

Respondent Haugen filed suit pursuant to 42 U. S. C. § 1983, alleging that petitioner Brosseau, a police officer, violated his Fourth Amendment right to be free from excessive force when she shot him in the back as he fled in his vehicle. The Federal District Court granted Brosseau summary judgment, finding her entitled to qualified immunity. In reversing, the Ninth Circuit found that Brosseau had violated Haugen's Fourth Amendment right and that, because that right was clearly established, Brosseau was not entitled to qualified immunity.

Held: The Ninth Circuit wrongly decided the qualified immunity issue. Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. *Saucier* v. *Katz*, 533 U. S. 194, 206. The focus is on whether the officer had fair notice that her conduct was unlawful. If the law at the time of the conduct did not clearly establish that the conduct would violate the Constitution, the officer should not be subject to liability. This inquiry is "undertaken in light of the specific context of the case, not as a broad general proposition." *Id.*, at 201. This case is far from the obvious one where the general tests set out in *Graham* v. *Connor*, 490 U. S. 386, and *Tennessee* v. *Garner*, 471 U. S. 1, can "clearly establish" the answer, even without a body of relevant case law. The handful of cases relevant to Brosseau's situation show that this is an area in which the result depends very much on the facts of each case; suggest that Brosseau's actions fell in the "'hazy border between excessive and acceptable force,'" *Saucier* v. *Katz*, 533 U. S., at 206; and by no means "'"clearly establis[h]"'" that her conduct violated the Fourth Amendment, *id.*, at 202.

Certiorari granted; 339 F. 3d 857, reversed and remanded.

PER CURIAM.

Officer Rochelle Brosseau, a member of the Puyallup, Washington, Police Department, shot Kenneth Haugen in the back as he attempted to flee from law enforcement authorities in his vehicle. Haugen subsequently filed this action in the United States District Court for the Western District of

Washington pursuant to Rev. Stat. § 1979, 42 U. S. C. § 1983. He alleged that the shot fired by Brosseau constituted excessive force and violated his federal constitutional rights.[1] The District Court granted summary judgment to Brosseau after finding she was entitled to qualified immunity. The Court of Appeals for the Ninth Circuit reversed. 339 F. 3d 857 (2003). Following the two-step process set out in *Saucier* v. *Katz*, 533 U. S. 194 (2001), the Court of Appeals found, first, that Brosseau had violated Haugen's Fourth Amendment right to be free from excessive force and, second, that the right violated was clearly established and thus Brosseau was not entitled to qualified immunity. Brosseau then petitioned for writ of certiorari, requesting that we review both of the Court of Appeals' determinations. We grant the petition on the second, qualified immunity question and reverse.

The material facts, construed in a light most favorable to Haugen, are as follows.[2] On the day before the fracas, Glen Tamburello went to the police station and reported to Brosseau that Haugen, a former crime partner of his, had stolen tools from his shop. Brosseau later learned that there was a felony no-bail warrant out for Haugen's arrest on drug and other offenses. The next morning, Haugen was spray painting his Jeep Cherokee in his mother's driveway. Tamburello learned of Haugen's whereabouts, and he and cohort Matt Atwood drove a pickup truck to Haugen's mother's house to pay Haugen a visit. A fight ensued, which was witnessed by a neighbor who called 911.

Brosseau heard a report that the men were fighting in Haugen's mother's yard and responded. When she arrived, Tamburello and Atwood were attempting to get Haugen into

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[1] Haugen also asserted pendent state-law claims and claims against the city and police department. These claims are not presently before us.

[2] Because this case arises in the posture of a motion for summary judgment, we are required to view all facts and draw all reasonable inferences in favor of the nonmoving party, Haugen. See *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001).

Tamburello's pickup. Brosseau's arrival created a distraction, which provided Haugen the opportunity to get away. Haugen ran through his mother's yard and hid in the neighborhood. Brosseau requested assistance, and, shortly thereafter, two officers arrived with a K–9 to help track Haugen down. During the search, which lasted about 30 to 45 minutes, officers instructed Tamburello and Atwood to remain in Tamburello's pickup. They instructed Deanna Nocera, Haugen's girlfriend who was also present with her 3-year-old daughter, to remain in her small car with her daughter. Tamburello's pickup was parked in the street in front of the driveway; Nocera's small car was parked in the driveway in front of and facing the Jeep; and the Jeep was in the driveway facing Nocera's car and angled somewhat to the left. The Jeep was parked about 4 feet away from Nocera's car and 20 to 30 feet away from Tamburello's pickup.

An officer radioed from down the street that a neighbor had seen a man in her backyard. Brosseau ran in that direction, and Haugen appeared. He ran past the front of his mother's house and then turned and ran into the driveway. With Brosseau still in pursuit, he jumped into the driver's side of the Jeep and closed and locked the door. Brosseau believed that he was running to the Jeep to retrieve a weapon.

Brosseau arrived at the Jeep, pointed her gun at Haugen, and ordered him to get out of the vehicle. Haugen ignored her command and continued to look for the keys so he could get the Jeep started. Brosseau repeated her commands and hit the driver's side window several times with her handgun, which failed to deter Haugen. On the third or fourth try, the window shattered. Brosseau unsuccessfully attempted to grab the keys and struck Haugen on the head with the barrel and butt of her gun. Haugen, still undeterred, succeeded in starting the Jeep. As the Jeep started or shortly after it began to move, Brosseau jumped back and to the left. She fired one shot through the rear driver's side window

at a forward angle, hitting Haugen in the back. She later explained that she shot Haugen because she was "'fearful for the other officers on foot who [she] believed were in the immediate area, [and] for the occupied vehicles in [Haugen's] path and for any other citizens who might be in the area.'" 339 F. 3d, at 865.

Despite being hit, Haugen, in his words, "'st[ood] on the gas'"; navigated the "'small, tight space'" to avoid the other vehicles; swerved across the neighbor's lawn; and continued down the street. *Id.*, at 882. After about a half block, Haugen realized that he had been shot and brought the Jeep to a halt. He suffered a collapsed lung and was airlifted to a hospital. He survived the shooting and subsequently pleaded guilty to the felony of "eluding." Wash. Rev. Code § 46.61.024 (1994). By so pleading, he admitted that he drove his Jeep in a manner indicating "a wanton or wilful disregard for the lives . . . of others." *Ibid.* He subsequently brought this § 1983 action against Brosseau.

* * *

When confronted with a claim of qualified immunity, a court must ask first the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier* v. *Katz*, 533 U. S., at 201. As the Court of Appeals recognized, the constitutional question in this case is governed by the principles enunciated in *Tennessee* v. *Garner*, 471 U. S. 1 (1985), and *Graham* v. *Connor*, 490 U. S. 386 (1989). These cases establish that claims of excessive force are to be judged under the Fourth Amendment's "'objective reasonableness'" standard. *Id.*, at 388. Specifically with regard to deadly force, we explained in *Garner* that it is unreasonable for an officer to "seize an unarmed, nondangerous suspect by shooting him dead." 471 U. S., at 11. But "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical

harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Ibid.*

We express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity.[3]

Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. *Saucier* v. *Katz*, 533 U. S., at 206 (qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force'"). Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

It is important to emphasize that this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.*, at 201. As we previously said in this very context:

> "[T]here is no doubt that *Graham* v. *Connor*, *supra*, clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* [v. *Creighton*] 'that the right the official is alleged to have violated must have been "clearly established" in

[3] We have no occasion in this case to reconsider our instruction in *Saucier* v. *Katz*, *supra*, that lower courts decide the constitutional question prior to deciding the qualified immunity question. We exercise our summary reversal procedure here simply to correct a clear misapprehension of the qualified immunity standard.

> a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' 483 U. S. [635,] 640 [(1987)]. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*, at 201–202.

The Court of Appeals acknowledged this statement of law, but then proceeded to find fair warning in the general tests set out in *Graham* and *Garner*. 339 F. 3d, at 873–874. In so doing, it was mistaken. *Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality. See *Graham* v. *Connor*, *supra*, at 396 ("'[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application'"). Of course, in an obvious case, these standards can "clearly establish" the answer, even without a body of relevant case law. See *Hope* v. *Pelzer*, 536 U. S. 730, 738 (2002) (noting in a case where the Eighth Amendment violation was "obvious" that there need not be a materially similar case for the right to be clearly established). See also *Pace* v. *Capobianco*, 283 F. 3d 1275, 1283 (CA11 2002) (explaining in a Fourth Amendment case involving an officer shooting a fleeing suspect in a vehicle that, "when we look at decisions such as *Garner* and *Graham*, we see some tests to guide us in determining the law in many different kinds of circumstances; but we do not see the kind of clear law (clear answers) that would apply" to the situation at hand). The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision.

We therefore turn to ask whether, at the time of Brosseau's actions, it was "'"clearly established"'" in this more "'particularized'" sense that she was violating Haugen's Fourth Amendment right. *Saucier* v. *Katz*, 533 U. S., at

202. The parties point us to only a handful of cases relevant to the "situation [Brosseau] confronted": whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.[4] *Ibid.* Specifically, Brosseau points us to *Cole* v. *Bone*, 993 F. 2d 1328 (CA8 1993), and *Smith* v. *Freland*, 954 F. 2d 343 (CA6 1992).

In these cases, the courts found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others. *Cole* v. *Bone*, *supra*, at 1333 (holding the officer "had probable cause to believe that the truck posed an imminent threat of serious physical harm to innocent motorists as well as to the officers themselves"); *Smith* v. *Freland*, 954 F. 2d, at 347 (noting "a car can be a deadly weapon" and holding the officer's decision to stop the car from possibly injuring others was reasonable). *Smith* is closer to this case. There, the officer and suspect engaged in a car chase, which appeared to be at an end when the officer cornered the suspect at the back of a dead-end residential street. The suspect, however, freed his car and began speeding down the street. At this point, the officer fired a shot, which killed the suspect. The court held the officer's decision was reasonable and thus did not violate the Fourth Amendment. It noted that the suspect, like Haugen here, "had proven he would do almost anything to avoid capture" and that he posed a major threat to, among others, the officers at the end of the street. *Ibid.*

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[4] The parties point us to a number of other cases in this vein that postdate the conduct in question, *i. e.*, Brosseau's February 21, 1999, shooting of Haugen. See *Cowan ex rel. Estate of Cooper* v. *Breen*, 352 F. 3d 756, 763 (CA2 2003); *Pace* v. *Capobianco*, 283 F. 3d 1275, 1281–1282 (CA11 2002); *Scott* v. *Clay County*, 205 F. 3d 867, 877 (CA6 2000); *McCaslin* v. *Wilkins*, 183 F. 3d 775, 778–779 (CA8 1999); *Abraham* v. *Raso*, 183 F. 3d 279, 288–296 (CA3 1999). These decisions, of course, could not have given fair notice to Brosseau and are of no use in the clearly established inquiry.

Haugen points us to *Estate of Starks* v. *Enyart*, 5 F. 3d 230 (CA7 1993), where the court found summary judgment inappropriate on a Fourth Amendment claim involving a fleeing suspect. There, the court concluded that the threat created by the fleeing suspect's failure to brake when an officer suddenly stepped in front of his just-started car was not a sufficiently grave threat to justify the use of deadly force. *Id.*, at 234.

These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the "'hazy border between excessive and acceptable force.'" *Saucier* v. *Katz*, *supra*, at 206. The cases by no means "clearly establish" that Brosseau's conduct violated the Fourth Amendment.

The judgment of the United States Court of Appeals for the Ninth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE SCALIA and JUSTICE GINSBURG join, concurring.

I join the Court's opinion but write separately to express my concern about the matter to which the Court refers in footnote 3, namely, the way in which lower courts are required to evaluate claims of qualified immunity under the Court's decision in *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). As the Court notes, *ante*, at 198, n. 3, *Saucier* requires lower courts to decide (1) the constitutional question prior to deciding (2) the qualified immunity question. I am concerned that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e. g.*, qualified immunity) that will satisfactorily resolve the case before the court. Indeed when courts' dockets are crowded, a rigid "order of

battle" makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review, see *Bunting* v. *Mellen*, 541 U. S. 1019, 1025 (2004) (SCALIA, J., dissenting from denial of certiorari). For these reasons, I think we should reconsider this issue.

JUSTICE STEVENS, dissenting.

In my judgment, the answer to the constitutional question presented by this case is clear: Under the Fourth Amendment, it was objectively unreasonable for Officer Brosseau to use deadly force against Kenneth Haugen in an attempt to prevent his escape. What is not clear is whether Brosseau is nonetheless entitled to qualified immunity because it might not have been apparent to a reasonably well-trained officer in Brosseau's shoes that killing Haugen to prevent his escape was unconstitutional. In my opinion that question should be answered by a jury.

I

Law enforcement officers should never be subject to damages liability for failing to anticipate novel developments in constitutional law. Accordingly, whenever a suit against an officer is based on the alleged violation of a constitutional right that has not been clearly established, the qualified immunity defense is available. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). Prompt dismissal of such actions protects officers from unnecessary litigation and accords with this Court's wise "policy of avoiding the unnecessary adjudication of constitutional questions." *County of Sacramento* v. *Lewis*, 523 U. S. 833, 859 (1998) (STEVENS, J., concurring in judgment). When, however, the applicable constitutional rule is well settled, "we should address the constitutional question at the outset." *Ibid.*; see also *Siegert* v. *Gilley*, 500 U. S. 226 (1991). The constitutional limits on the use of deadly force have been clearly established for almost two decades.

In 1985, we held that the killing of an unarmed burglar to prevent his escape was an unconstitutional seizure. *Tennessee* v. *Garner*, 471 U. S. 1. We considered, and rejected, the State's contention that the Fourth Amendment's prohibition against unreasonable seizures should be construed in light of the common-law rule, which allowed the use of whatever force was necessary to effectuate the arrest of a fleeing felon. *Id.*, at 12–13. We recognized that the common-law rule had been fashioned "when virtually all felonies were punishable by death" and long before guns were available to the police, and noted that modern police departments in a majority of large cities allowed the firing of a weapon only when a felon presented a threat of death or serious bodily harm. *Id.*, at 13–19. We concluded that "changes in the legal and technological context" had made the old rule obsolete. *Id.*, at 15.

Unlike most "excessive force" cases in which the degree of permissible force varies widely from case to case, the only issue in a "deadly force" case is whether the facts apparent to the officer justify a decision to kill a suspect in order to prevent his escape.

In *Garner* we stated the governing rule:

> "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. . . .
>
> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or

> there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.*, at 11–12.

The most common justifications for the use of deadly force are plainly inapplicable to this case. Respondent Haugen had not threatened anyone with a weapon, and petitioner Brosseau did not shoot in order to defend herself.[1] Haugen was not a person who had committed a violent crime; nor was there any reason to believe he would do so if permitted to escape. Indeed, there is nothing in the record to suggest he intended to harm anyone.[2] The "threat of serious physical harm, either to the officer or to others," *id.*, at 11, that provides the sole justification for Brosseau's use of deadly force was the risk that while fleeing in his vehicle Haugen would accidentally collide with a pedestrian or another vehicle. Whether Brosseau's shot enhanced or minimized that risk is debatable, but the risk of such an accident surely did

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[1] Although Brosseau attested that she believed Haugen may have been attempting to retrieve a weapon from the floorboard of his vehicle sometime during the struggle, a fact which Haugen hotly contests, there is no evidence in the record to suggest that, at the time the shot was fired, Brosseau believed, or any reasonable officer would have thought, that Haugen had access to a weapon at that moment.

[2] At the time of the shooting, Brosseau had the following facts at her disposal. Haugen had a felony no-bail warrant for a nonviolent drug offense, was suspected in a nonviolent burglary, and had been fleeing from law enforcement on foot for approximately 30 to 45 minutes without incident. At the behest of Brosseau, the private individuals on the scene were inside their respective vehicles. Haugen's girlfriend and her daughter were in a small car approximately four feet in front and slightly to the right of Haugen's Jeep; Glen Tamburello and Matt Atwood were inside a pickup truck on the street blocking the driveway, approximately 20 to 30 feet from Haugen's Jeep. The only two police officers on foot at the scene were last seen in a neighbor's backyard, two houses down and to the right of the driveway.

not justify an attempt to kill the fugitive.[3] Thus, I have no difficulty in endorsing the Court's assumption that Brosseau's conduct violated the Constitution.

II

An officer is entitled to qualified immunity, despite having engaged in constitutionally deficient conduct, if, in doing so, she did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U. S., at 818. The requirement that the law be clearly established is designed to ensure that officers have fair notice of what conduct is proscribed. See *Hope* v. *Pelzer*, 536 U. S. 730, 739 (2002). Accordingly, we have recognized that "general statements of the law are not inherently incapable of giving fair and clear warning," *United States* v. *Lanier*, 520 U. S. 259, 271 (1997), and have firmly rejected the notion that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987).

Thus, the Court's search for relevant case law applying the *Garner* standard to materially similar facts is both unnecessary and ill advised. See *Hope*, 536 U. S., at 741 ("Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding"); see also *Lanier*, 520 U. S., at 269. Indeed, the cases the majority relies on are inapposite and, in fact, only serve

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[3] The evidence supporting Haugen's allegation that Brosseau did "willfully fire her weapon with the intent to murder me," 1 Record, Doc. No. 1, includes a statement by a defense expert that Brosseau had "clearly articulated her intention to use deadly force," *id.*, Doc. No. 24. Moreover, the report of the Puyallup, Washington, Police Department Firearms Review Board stated that Brosseau "chose to use deadly force to stop Haugen." 2 *id.*, Doc. No. 27, Exh. H.

to illuminate the patent unreasonableness of Brosseau's actions.[4]

Rather than uncertainty about the law, it is uncertainty about the likely consequences of Haugen's flight—or, more precisely, uncertainty about how a reasonable officer making the split-second decision to use deadly force would have assessed the foreseeability of a serious accident—that prevents me from answering the question of qualified immunity that this case presents. This is a quintessentially "fact-specific" question, not a question that judges should try to answer "as a matter of law." Cf. *Anderson*, 483 U. S., at 641. Although it is preferable to resolve the qualified immunity question at the earliest possible stage of litigation, this preference does not give judges license to take inherently factual questions away from the jury. See *Hunter* v. *Bryant*, 502 U. S. 224, 229 (1991) *(per curiam)* (SCALIA, J., concurring in judgment); *id.*, at 233 (STEVENS, J., dissenting) ("'Whether

[4] In *Cole* v. *Bone*, 993 F. 2d 1328 (CA8 1993), an 18-wheel tractor-trailer sped through a tollbooth and engaged the police in a high-speed pursuit in excess of 90 miles per hour on a high-traffic interstate during the holiday season. During the course of the pursuit, the driver passed traffic on both shoulders of the interstate, repeatedly attempted to ram several police cars, drove more than 100 passenger vehicles off the road, ran through several roadblocks, and continued driving after the officer shot out the wheels of the fugitive's truck. *Id.*, at 1330–1331. Only then did the officer finally resort to deadly force to disable the driver. Similarly, in *Smith* v. *Freland*, 954 F. 2d 343 (CA6 1992), the suspect led a police officer on a high-speed chase, reaching speeds in excess of 90 miles per hour. When the officer initially cornered the suspect in a field, the driver repeatedly swerved directly toward the police car, forcing the officer to move out of the way and allowing the suspect to continue the chase. *Id.*, at 344. Only after additional officers cornered the suspect for a second time, and after the suspect smashed directly into an unoccupied police car and began to flee again, did the officer finally shoot the driver. *Ibid.*

In stark contrast, at the time Brosseau shot Haugen, the Jeep was immobile, or at best, had just started moving. Haugen had not driven at excess speeds; nor had he rammed, or attempted to ram, nearby police cars or passenger vehicles. In sum, there was no ongoing or prior high-speed car chase to inform the probable-cause analysis.

a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment or a directed verdict in a § 1983 action based on [the] lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach'" (quoting *Bryant* v. *U. S. Treasury Dept., Secret Service*, 903 F. 2d 717, 721 (CA9 1990))). The bizarre scenario described in the record of this case convinces me that reasonable jurors could well disagree about the answer to the qualified immunity issue. My conclusion is strongly reinforced by the differing opinions expressed by the Circuit Judges who have reviewed the record.

III

The Court's attempt to justify its decision to reverse the Court of Appeals without giving the parties an opportunity to provide full briefing and oral argument is woefully unpersuasive. If Brosseau had deliberately shot Haugen in the head and killed him, the legal issues would have been the same as those resulting from the nonfatal wound. I seriously doubt that my colleagues would be so confident about the result as to decide the case without the benefit of briefs or argument on such facts.[5] At a minimum, the Ninth Circuit's decision was not clearly erroneous, and the extraordinary remedy of summary reversal is not warranted on these facts. See R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 281 (6th ed. 1986).

In sum, the constitutional limits on an officer's use of deadly force have been well settled in this Court's jurisprudence for nearly two decades, and, in this case, Officer Brosseau acted outside of those clearly delineated bounds.

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[5] The Court's recitation of the facts that led up to the shooting obscures the undisputed point that no one contends Haugen was the kind of dangerous person—perhaps a terrorist or an escaped convict on a crime spree—who would have been a danger to the community if he had been allowed to escape. The factual issues relate only to the danger that he posed while in the act of escaping.

Nonetheless, in my judgment, there is a genuine factual question as to whether a reasonably well-trained officer standing in Brosseau's shoes could have concluded otherwise, and that question plainly falls with the purview of the jury.

For these reasons, I respectfully dissent.

Syllabus

WHITFIELD *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03–1293. Argued November 30, 2004—Decided January 11, 2005*

Petitioners were convicted of conspiracy to launder money in violation of 18 U. S. C. § 1956(h) after the District Court denied their request to instruct the jury that the Government was required to prove beyond a reasonable doubt that at least one of the co-conspirators had committed an overt act in furtherance of the conspiracy. The Court of Appeals affirmed the convictions, holding, in relevant part, that the jury instructions were proper because § 1956(h) does not require proof of an overt act.

Held: Conviction for conspiracy to commit money laundering, in violation of § 1956(h), does not require proof of an overt act in furtherance of the conspiracy. Pp. 212–219.

(a) Section 1956(h) provides: "Any person who conspires to commit any offense defined in [§ 1956] or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." In *United States* v. *Shabani*, 513 U. S. 10, this Court held that the nearly identical language of the drug conspiracy statute, 21 U. S. C. § 846, does not require proof of an overt act. The *Shabani* Court found instructive the distinction between § 846 and the general conspiracy statute, 18 U. S. C. § 371, which supersedes the common law rule by expressly including an overt-act requirement. *Shabani* distilled the governing rule for conspiracy statutes: *Nash* v. *United States*, 229 U. S. 373, and *Singer* v. *United States*, 323 U. S. 338, "'give Congress a formulary: by choosing a text modeled on § 371, it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 U. S. C. § 1 [which, like 21 U. S. C. § 846, omits any express overt-act requirement], it dispenses with such a requirement.'" 513 U. S., at 14. This rule dictates the outcome here as well: Because § 1956(h)'s text does not expressly make the commission of an overt act an element of the conspiracy offense, the Government need not prove an overt act to obtain a conviction. Pp. 212–214.

(b) Petitioners' argument that *Shabani* is inapplicable because § 1956(h) does not establish a new conspiracy *offense*, but merely in-

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*Together with No. 03–1294, *Hall* v. *United States*, also on certiorari to the same court.

Syllabus

creases the *penalty* for conviction of a money laundering conspiracy under § 371, is untenable for two reasons: Section 1956(h)'s text is sufficient to establish an offense and fails to provide any cross-reference to § 371. Had Congress intended to create the scheme petitioners envision, it would have done so in clearer terms. Because § 1956(h)'s text is plain and unambiguous, the Court need not consider petitioners' argument that the provision's legislative history supports their construction by virtue of its failure to indicate that Congress meant to create a new offense or to eliminate § 371's overt-act requirement for money laundering conspiracies. In any event, mere silence in the legislative history cannot justify reading an overt-act requirement into § 1956(h). See, *e. g.*, *United States* v. *Wells*, 519 U. S. 482, 496–497. Petitioners' legislative history argument is particularly inapt here because Congress is presumed to have had knowledge of *Nash* and *Singer* when it enacted § 1956(h). Petitioners' arguments as to § 1956's text and structure as a whole—(1) that had Congress intended § 1956(h) to create a new conspiracy offense, it would have placed that offense with the three substantive money laundering offenses set forth in § 1956(a); and (2) that by providing that "[a] prosecution for [a money laundering] conspiracy offense . . . may be brought in the district where venue would lie for the completed offense under [§ 1956(i)(1)], or in any other district where an act in furtherance of the . . . conspiracy took place," § 1956(i)(2), Congress confirmed that proof of an overt act was required under § 1956(h)—are not persuasive. Pp. 214–218.

349 F. 3d 1320, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Sharon C. Samek, by appointment of the Court, *post*, p. 985, argued the cause for petitioners in both cases. With her on the briefs were *Thomas C. Goldstein*, *Amy Howe*, *Pamela S. Karlan*, and *Richard Ware Levitt*.

Jonathan L. Marcus argued the cause for the United States in both cases. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Wray*, *Deputy Solicitor General Dreeben*, and *Kirby A. Heller*.†

†*Richard A. Greenberg* and *Joshua L. Dratel* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal in both cases.

JUSTICE O'CONNOR delivered the opinion of the Court.

These cases present the question whether conviction for conspiracy to commit money laundering, in violation of 18 U. S. C. § 1956(h), requires proof of an overt act in furtherance of the conspiracy. We hold that it does not.

I

In March 1999, a federal grand jury returned a 20-count indictment against petitioners and five codefendants. As relevant here, Count II of the indictment charged petitioners with conspiracy to launder money, in violation of § 1956(h). The indictment described, in general terms, the "manner and means" used to accomplish the objects of the money laundering conspiracy, but it did not charge the defendants with the commission of any overt act in furtherance thereof.

At trial, the Government presented evidence that petitioners were members of the executive board of an entity known as Greater Ministries International Church (GMIC). GMIC operated a "gifting" program that took in more than $400 million between 1996 and 1999. Under that program, petitioners and others induced unwary investors to give money to GMIC with promises that investors would receive double their money back within a year and a half. Petitioners marketed the program throughout the country, claiming that GMIC would generate returns on investors' "gifts" through overseas investments in gold and diamond mining, commodities, and offshore banks. Investors were told that GMIC would use some of the profits for philanthropic purposes. Most of these claims were false. GMIC made none of the promised investments, had no assets, and gave virtually nothing to charity. Many participants in GMIC's program received little or no return on their money, and their investments indeed largely turned out to be "gifts" to GMIC representatives. Petitioners together allegedly received more than $1.2 million in commissions on the money they solicited.

At the close of the evidence, petitioners asked the District Court to instruct the jury that the Government was required to prove beyond a reasonable doubt that at least one of the co-conspirators had committed an overt act in furtherance of the money laundering conspiracy. The court denied that request, and the jury returned a verdict of guilty on the money laundering conspiracy charge.

The Eleventh Circuit affirmed petitioners' convictions, holding, in relevant part, that the jury instructions approved by the District Court were proper because § 1956(h) does not require proof of an overt act. 349 F. 3d 1320, 1324 (2003). The Court of Appeals noted that some of its sister Circuits had taken the opposite position. *Id.*, at 1323 (citing *United States* v. *Wilson*, 249 F. 3d 366, 379 (CA5 2001); *United States* v. *Hildebrand*, 152 F. 3d 756, 762 (CA8 1998)). It concluded, however, that those decisions were erroneously based on case law interpreting the general conspiracy statute, 18 U. S. C. § 371, which, unlike § 1956(h), expressly includes an overt-act requirement. 349 F. 3d, at 1323. The Eleventh Circuit instead relied upon *United States* v. *Shabani*, 513 U. S. 10 (1994), where we held that the drug conspiracy statute, 21 U. S. C. § 846, does not require proof of an overt act. Because the language of 18 U. S. C. § 1956(h) and 21 U. S. C. § 846 is "nearly identical," the Eleventh Circuit found itself compelled to follow the reasoning of *Shabani* in holding that § 1956(h), too, requires no proof of an overt act. 349 F. 3d, at 1323–1324. We granted certiorari to resolve the conflict among the Circuits on the question presented, 542 U. S. 918 (2004), and we now affirm the decision below.

II

Congress enacted 18 U. S. C. §§ 1956 and 1957 (2000 ed. and Supp. II) as part of the Money Laundering Control Act of 1986, Pub. L. 99–570, 100 Stat. 3207–18. Section 1956 penalizes the knowing and intentional transportation or transfer of monetary proceeds from specified unlawful activities,

while § 1957 addresses transactions involving criminally derived property exceeding $10,000 in value. As originally enacted, neither section included a conspiracy provision. Accordingly, the Government relied on the general conspiracy statute, 18 U. S. C. § 371, to prosecute conspiracies to commit the offenses set forth in §§ 1956 and 1957. In 1992, however, Congress enacted the money laundering conspiracy provision at issue in these cases, now codified at 18 U. S. C. § 1956(h). See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. 102–550, § 1530, 106 Stat. 4066. Section 1956(h) provides: "Any person who conspires to commit any offense defined in [§ 1956] or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

In *Shabani*, we addressed whether the nearly identical language of the drug conspiracy statute, 21 U. S. C. § 846, requires proof of an overt act. See *ibid.* ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy"). We held that it does not, relying principally upon our earlier decisions in *Nash* v. *United States*, 229 U. S. 373 (1913), and *Singer* v. *United States*, 323 U. S. 338 (1945). See *Shabani*, *supra*, at 13–14. In each of those cases, the Court held that, where Congress had omitted from the relevant conspiracy provision any language expressly requiring an overt act, the Court would not read such a requirement into the statute. See *Singer*, *supra*, at 340 (Selective Training and Service Act of 1940); *Nash*, *supra*, at 378 (Sherman Act).

As we explained in *Shabani*, these decisions "follow the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms. See *Molzof* v. *United States*, 502 U. S. 301, 307–308 (1992). We have consistently held that the common law understanding of conspiracy 'does not

make the doing of any act other than the act of conspiring a condition of liability.'" 513 U. S., at 13–14 (quoting *Nash, supra,* at 378). In concluding that the drug conspiracy statute in *Shabani* did not require proof of an overt act, we found instructive the distinction between that statute and the general conspiracy statute, § 371, which supersedes the common law rule by expressly including an overt-act requirement. 513 U. S., at 14. See 18 U. S. C. § 371 ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, *and one or more of such persons do any act to effect the object of the conspiracy,* each shall be fined under this title or imprisoned not more than five years, or both" (emphasis added)).

Shabani distilled the governing rule for conspiracy statutes as follows: "'*Nash* and *Singer* give Congress a formulary: by choosing a text modeled on § 371, it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 U. S. C. § 1 [which, like 21 U. S. C. § 846, omits any express overt-act requirement], it dispenses with such a requirement.'" 513 U. S., at 14 (quoting *United States* v. *Sassi,* 966 F. 2d 283, 284 (CA7 1992)). This rule dictates the outcome in the instant cases as well: Because the text of § 1956(h) does not expressly make the commission of an overt act an element of the conspiracy offense, the Government need not prove an overt act to obtain a conviction.

III

Petitioners argue that the rule that governed *Shabani* is inapplicable here, because § 1956(h) does not establish a new conspiracy *offense;* rather, they say, it merely increases the *penalty* for conviction of a money laundering conspiracy under § 371. In other words, as we understand their argument, petitioners contend that the Government must continue to prosecute money laundering conspiracies under § 371, but that § 1956(h) now provides enhanced penalties for

conviction. Since § 371 contains an overt act requirement, the argument goes, the Government must prove an overt act in prosecutions *ostensibly* brought under § 1956(h). This reading of § 1956(h) is untenable for two principal reasons. First, petitioners concede—as they must—that § 1956(h)'s text is sufficient to establish an offense. Indeed, its language is nearly identical to the drug conspiracy statute at issue in *Shabani*, which indisputably created an offense. Second, petitioners apparently read § 1956(h) to supply an enhanced penalty *for violation of § 371* in cases where the object of the conspiracy is to violate the substantive money laundering offenses in §§ 1956(a) and 1957. But the text of § 1956(h) fails to provide any cross-reference to § 371. Mere use of the word "conspires" surely is not enough to establish the necessary link between these two separate statutes. In short, if Congress had intended to create the scheme petitioners envision, it would have done so in clearer terms.

Petitioners seek support for their construction of § 1956(h) in the provision's legislative history. They contend that this history contains no indication that Congress meant to create a new offense or to eliminate the pre-existing overt-act requirement for money laundering conspiracy prosecutions that hitherto had been brought under § 371. They say that the history instead shows that § 1956(h) was intended only to raise the penalty for money laundering conspiracy from the 5-year maximum sentence under § 371 to the greater maximums available for substantive money laundering offenses under §§ 1956(a) and 1957. Petitioners also point out that, when Congress enacted § 1956(h), it did so under the title "*Penalty* for Money Laundering Conspiracies," 106 Stat., at 4066 (emphasis added). Had Congress wanted to enact an "offense" provision, they argue, it would have titled it accordingly.

Because the meaning of § 1956(h)'s text is plain and unambiguous, we need not accept petitioners' invitation to consider the legislative history. But even were we to do so,

we would reach the same conclusion. It is undisputed that Congress intended § 1956(h) to increase the penalties for money laundering conspiracies. The provision's text makes clear that Congress did so precisely by establishing a new offense. Given the clarity of the text, mere silence in the legislative history cannot justify reading an overt-act requirement, or a cross-reference to § 371, into § 1956(h). See, *e. g.*, *United States* v. *Wells*, 519 U. S. 482, 496–497 (1997) (refusing to read a materiality element into the statute at issue based on silence in the legislative history); *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 592 (1980) ("[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute"). Nor do we find it significant that Congress chose to label § 1956(h) a "penalty" rather than an "offense" provision. See *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) ("'[T]he title of a statute . . . cannot limit the plain meaning of the text'"); *Castillo* v. *United States*, 530 U. S. 120, 125 (2000) (although "[t]he title of the entirety of § 924 is 'Penalties' . . . at least some portion of § 924 . . . creates, not penalty enhancements, but entirely new crimes").

Petitioners' legislative history argument is particularly inapt here, we might add, because Congress is presumed to have knowledge of the governing rule described in *Shabani*. While *Shabani* was decided two years after § 1956(h) was enacted, the rule it articulated was established decades earlier in *Nash* and *Singer*. These decisions establish a "formulary" that provides clear and predictable guidance to Congress. As the Government points out, Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so. See Brief for United States 11, and n. 5 (citing statutes). Where Congress has chosen *not* to do so, we will

not override that choice based on vague and ambiguous signals from legislative history.

We conclude by addressing two arguments raised by petitioners relating to the text and structure of § 1956 as a whole. First, petitioners note that Congress placed each of the three substantive money laundering offenses in § 1956 under subsection (a). Had the drafters intended § 1956(h) to create a new offense, petitioners contend, they would have placed it with the other offenses in subsection (a) instead of in its own separate subsection. We fail to see why that should be so. The three offenses placed in subsection (a) share a common feature: All are *substantive* money laundering crimes. We find nothing remarkable in Congress' decision to place a qualitatively different *conspiracy* offense provision in a separate subsection.

Petitioners' second textual argument is based on § 1956(i) (2000 ed., Supp. II), a venue provision added to the statute in 2001. See USA PATRIOT ACT, Pub. L. 107–56, § 1004, 115 Stat. 392. Section 1956(i)(2) (2000 ed., Supp. II) provides that "[a] prosecution for an attempt or conspiracy offense under [§ 1956 or § 1957] may be brought in the district where venue would lie for the completed offense under [§ 1956(i)(1)], or in any other district where an act in furtherance of the attempt or conspiracy took place." Petitioners contend that, by setting venue in the district where an overt act took place, Congress confirmed what (petitioners say) was the majority view of the Courts of Appeals at the time of § 1956(i)'s enactment: that proof of an overt act was required under § 1956(h). Moreover, petitioners argue, setting venue where an overt act took place makes little sense if such an act is not an element of the offense.

This argument fails for several reasons. As a preliminary matter, petitioners assume that § 1956(i) is the sole provision setting venue in money laundering conspiracy prosecutions. Although we need not definitively construe that provision here, we note that its language appears permissive rather

than exclusive—§ 1956(i) says a conspiracy prosecution "*may* be brought" in a district meeting the specified criteria. (Emphasis added.) This suggests that the provision serves to supplement, rather than supplant, the default venue rule: "Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." Fed. Rule Crim. Proc. 18. For a conspiracy prosecution under the common law rule, the district in which the unlawful agreement was reached would satisfy this default venue rule. See *Hyde* v. *Shine*, 199 U. S. 62, 76 (1905).

But even if we assume, for the sake of argument, that § 1956(i) is an exclusive venue provision, petitioners' argument still fails. The provision authorizes two alternative venues for money laundering conspiracy prosecutions: (1) the district in which venue *would* lie *if* the completed substantive money laundering offense had been accomplished, *or* (2) any district in which an overt act in furtherance of the conspiracy was committed. The first venue option clearly does not require that any overt act have been committed, and the Government therefore need not allege or prove such an act for venue to be properly established under this portion of § 1956(i). As to the second venue option, this Court has long held that venue is proper in any district in which an overt act in furtherance of the conspiracy was committed, even where an overt act is not a required element of the conspiracy offense. See, *e. g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 252 (1940); *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 402–404 (1927). In light of this longstanding rule, § 1956(i)(2)'s authorization of venue in a district where an overt act took place cannot be taken to indicate that Congress deemed such an act necessary for conviction under § 1956(h). Instead, Congress appears merely to have confirmed the availability of this alternative venue option in money laundering conspiracy cases.

* * *

For the reasons set forth above, we hold that conviction for conspiracy to commit money laundering, in violation of 18 U. S. C. § 1956(h), does not require proof of an overt act in furtherance of the conspiracy. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Syllabus

UNITED STATES *v.* BOOKER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 04–104. Argued October 4, 2004—Decided January 12, 2005*

Under the Federal Sentencing Guidelines, the sentence authorized by the jury verdict in respondent Booker's drug case was 210-to-262 months in prison. At the sentencing hearing, the judge found additional facts by a preponderance of the evidence. Because these findings mandated a sentence between 360 months and life, the judge gave Booker a 30-year sentence instead of the 21-year, 10-month, sentence he could have imposed based on the facts proved to the jury beyond a reasonable doubt. The Seventh Circuit held that this application of the Guidelines conflicted with the *Apprendi* v. *New Jersey*, 530 U. S. 466, 490, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Relying on *Blakely* v. *Washington*, 542 U. S. 296, the court held that the sentence violated the Sixth Amendment and instructed the District Court either to sentence Booker within the sentencing range supported by the jury's findings or to hold a separate sentencing hearing before a jury. In respondent Fanfan's case, the maximum sentence authorized by the jury verdict under the Guidelines was 78 months in prison. At the sentencing hearing, the District Judge found by a preponderance of the evidence additional facts authorizing a sentence in the 188-to-235-month range, which would have required him to impose a 15- or 16-year sentence instead of the 5 or 6 years authorized by the jury verdict alone. Relying on *Blakely*'s majority opinion, statements in its dissenting opinions, and the Solicitor General's brief in *Blakely*, the judge concluded that he could not follow the Guidelines and imposed a sentence based solely upon the guilty verdict in the case. The Government filed a notice of appeal in the First Circuit and a petition for certiorari before judgment in this Court.

Held: The judgment of the Court of Appeals in No. 04–104 is affirmed, and the case is remanded. The judgment of the District Court in No. 04–105 is vacated, and the case is remanded.

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*Together with No. 04–105, *United States* v. *Fanfan*, on certiorari before judgment to the United States Court of Appeals for the First Circuit.

Syllabus

No. 04–104, 375 F. 3d 508, affirmed and remanded; and No. 04–105, vacated and remanded.

JUSTICE STEVENS delivered the opinion of the Court in part, concluding that the Sixth Amendment as construed in *Blakely* applies to the Federal Sentencing Guidelines. Pp. 230–244.

(a) In addressing Washington State's determinate sentencing scheme, the *Blakely* Court found that *Jones* v. *United States*, 526 U. S. 227; *Apprendi* v. *New Jersey*, 530 U. S. 466; and *Ring* v. *Arizona*, 536 U. S. 584, made clear "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U. S., at 303. As *Blakely*'s dissenting opinions recognized, there is no constitutionally significant distinction between the Guidelines and the Washington procedure at issue in that case. This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges. Were the Guidelines merely advisory—recommending, but not requiring, the selection of particular sentences in response to differing sets of facts—their use would not implicate the Sixth Amendment. However, that is not the case. Title 18 U. S. C. §3553(b) directs that a court "*shall* impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures in specific, limited cases. Because they are binding on all judges, this Court has consistently held that the Guidelines have the force and effect of laws. Further, the availability of a departure where the judge "finds . . . an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described," §3553(b)(1), does not avoid the constitutional issue. Departures are unavailable in most cases because the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is legally bound to impose a sentence within the Guidelines range. Booker's case illustrates this point. The jury found him guilty of possessing at least 50 grams of crack cocaine, based on evidence that he had 92.5 grams. Under those facts, the Guidelines required a possible 210-to-262-month sentence. To reach Booker's actual sentence—which was almost 10 years longer—the judge found that he possessed an additional 566 grams of crack. Although the jury never heard any such evidence, the judge found it to be true by a preponderance of the evidence. Thus, as in *Blakely*, "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." 542 U. S., at 305. Finally, because there were no factors the Sentencing

Commission failed to adequately consider, the judge was required to impose a sentence within the higher Guidelines range. Pp. 230–237.

(b) The Government's arguments for its position that *Blakely*'s reasoning should not be applied to the Federal Sentencing Guidelines are unpersuasive. The fact that the Guidelines are promulgated by the Sentencing Commission, rather than Congress, is constitutionally irrelevant. The Court has not previously considered the question, but the same Sixth Amendment principles apply to the Sentencing Guidelines. Further, the Court's pre-*Apprendi* cases considering the Guidelines are inapplicable, as they did not consider the application of *Apprendi* to the Sentencing Guidelines. Finally, separation of powers concerns are not present here, and were rejected in *Mistretta* v. *United States*, 488 U. S. 361. In *Mistretta* the Court concluded that even though the Commission performed political rather than adjudicatory functions, Congress did not exceed constitutional limitations in creating the Commission. *Id.*, at 388, 393. That conclusion remains true regardless of whether the facts relevant to sentencing are labeled "sentencing factors" or "elements" of crimes. Pp. 237–244.

JUSTICE BREYER delivered the opinion of the Court in part, concluding that 18 U. S. C. § 3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with today's Sixth Amendment "jury trial" holding and therefore must be severed and excised from the Sentencing Reform Act of 1984 (Act). Section 3742(e), which depends upon the Guidelines' mandatory nature, also must be severed and excised. So modified, the Act makes the Guidelines effectively advisory, requiring a sentencing court to consider Guidelines ranges, see § 3553(a)(4), but permitting it to tailor the sentence in light of other statutory concerns, see § 3553(a). Pp. 246–268.

(a) Answering the remedial question requires a determination of what "Congress would have intended" in light of the Court's constitutional holding. *E. g.*, *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 767. Here, the Court must decide which of two approaches is the more compatible with Congress' intent as embodied in the Act: (1) retaining the Act (and the Guidelines) as written, with today's Sixth Amendment requirement engrafted onto it; or (2) eliminating some of the Act's provisions. Evaluation of the constitutional requirement's consequences in light of the Act's language, history, and basic purposes demonstrates that the requirement is not compatible with the Act as written and that some severance (and excision) is necessary. Congress would likely have preferred the total invalidation of the Act to an Act with the constitutional requirement engrafted onto it, but would likely have preferred the excision of the Act's mandatory language to the invalidation of the entire Act. Pp. 246–249.

(b) Several considerations demonstrate that adding the Court's constitutional requirement onto the Act as currently written would so transform the statutory scheme that Congress likely would not have intended the Act as so modified to stand. First, references to "[t]he court" in §3553(a)(1)—which requires "[t]he court" when sentencing to consider "the nature and circumstances of the offense and the history and characteristics of the defendant"—and references to "the judge" in the Act's history must be read in context to mean "the judge without the jury," not "the judge working together with the jury." That is made clear by §3661, which removes typical "jury trial" limitations on "the information" concerning the offender that the sentencing "court . . . may receive." Second, Congress' basic statutory goal of diminishing sentencing disparity depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* underlying the crime of conviction. In looking to real conduct, federal sentencing judges have long relied upon a probation officer's presentence report, which is often unavailable until *after* the trial. To engraft the Court's constitutional requirement onto the Act would destroy the system by preventing a sentencing judge from relying upon a presentence report for relevant factual information uncovered after the trial. Third, the Act, read to include today's constitutional requirement, would create a system far more complex than Congress could have intended, thereby greatly complicating the tasks of the prosecution, defense, judge, and jury. Fourth, plea bargaining would not significantly diminish the consequences of the Court's constitutional holding for the operation of the Guidelines, but would make matters worse, leading to sentences that gave greater weight not to real conduct, but rather to counsel's skill, the prosecutor's policies, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime. Fifth, Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward*, yet that is what the engrafted system would create. For all these reasons, the Act cannot remain valid in its entirety. Severance and excision are necessary. Pp. 249–258.

(c) The entire Act need not be invalidated, since most of it is perfectly valid. In order not to "invalidat[e] more of the statute than is necessary," *Regan* v. *Time, Inc.*, 468 U. S. 641, 652, the Court must retain those portions of the Act that are (1) constitutionally valid, *ibid.*, (2) capable of "functioning independently," *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684, and (3) consistent with Congress' basic objectives in enacting the statute, *Regan*, *supra*, at 653. Application of these criteria demonstrates that only §3553(b)(1), which requires sentencing courts to impose a sentence within the applicable Guidelines range (ab-

sent circumstances justifying a departure), and § 3742(e), which provides for *de novo* review on appeal of departures, must be severed and excised. With these two sections severed (and statutory cross-references to the two sections consequently invalidated), the rest of the Act satisfies the Court's constitutional requirement and falls outside the scope of *Apprendi* v. *New Jersey*, 530 U. S. 466. The Act still requires judges to take account of the Guidelines together with other sentencing goals, see § 3553(a)(4); to consider the Guidelines "sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant," pertinent Sentencing Commission policy statements, and the need to avoid unwarranted sentencing disparities and to restitute victims, §§ 3553(a)(1), (3)–(7); and to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed training and medical care, § 3553(a)(2). Moreover, despite § 3553(b)(1)'s absence, the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range). See §§ 3742(a) and (b). Excision of § 3742(e), which sets forth appellate review standards, does not pose a critical problem. Appropriate review standards may be inferred from related statutory language, the statute's structure, and the "'sound administration of justice.'" *Pierce* v. *Underwood*, 487 U. S. 552, 559–560. Here, these factors and the past two decades of appellate practice in cases involving departures from the Guidelines imply a familiar and practical standard of review: review for "unreasonable[ness]." See, *e. g.*, 18 U. S. C. § 3742(e)(3) (1994 ed.). Finally, the Act without its mandatory provision and related language remains consistent with Congress' intent to avoid "unwarranted sentencing disparities . . . [and] maintai[n] sufficient flexibility to permit individualized sentences when warranted," 28 U. S. C. § 991(b)(1)(B), in that the Sentencing Commission remains in place to perform its statutory duties, see § 994, the district courts must consult the Guidelines and take them into account when sentencing, see 18 U. S. C. § 3553(a)(4), and the courts of appeals review sentencing decisions for unreasonableness. Thus, it is more consistent with Congress' likely intent (1) to preserve the Act's important pre-existing elements while severing and excising §§ 3553(b) and 3742(e) than (2) to maintain all of the Act's provisions and engraft today's constitutional requirement onto the statutory scheme. Pp. 258–265.

(d) Other possible remedies—including, *e. g.*, the parties' proposals that the Guidelines remain binding in cases other than those in which the Constitution prohibits judicial factfinding and that the Act's pro-

visions requiring such factfinding at sentencing be excised—are rejected. Pp. 265–267.

(e) On remand in respondent Booker's case, the District Court should impose a sentence in accordance with today's opinions, and, if the sentence comes before the Seventh Circuit for review, that court should apply the review standards set forth in this Court's remedial opinion. In respondent Fanfan's case, the Government (and Fanfan should he so choose) may seek resentencing under the system set forth in today's opinions. As these dispositions indicate, today's Sixth Amendment holding and the Court's remedial interpretation of the Sentencing Act must be applied to all cases on direct review. See, *e. g.*, *Griffith* v. *Kentucky*, 479 U. S. 314, 328. That does not mean that every sentence will give rise to a Sixth Amendment violation or that every appeal will lead to a new sentencing hearing. That is because reviewing courts are expected to apply ordinary prudential doctrines, determining, *e. g.*, whether the issue was raised below and whether it fails the "plain-error" test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine. Pp. 267–268.

STEVENS, J., delivered the opinion of the Court in part, in which SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. BREYER, J., delivered the opinion of the Court in part, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and GINSBURG, JJ., joined, *post*, p. 244. STEVENS, J., filed an opinion dissenting in part, in which SOUTER, J., joined, and in which SCALIA, J., joined except for Part III and footnote 17, *post*, p. 272. SCALIA, J., *post*, p. 303, and THOMAS, J., *post*, p. 313, filed opinions dissenting in part. BREYER, J., filed an opinion dissenting in part, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined, *post*, p. 326.

Acting Solicitor General Clement argued the cause for the United States in both cases. With him on the brief were *Assistant Attorney General Wray, Deputy Solicitor General Dreeben, James A. Feldman, Dan Himmelfarb,* and *Nina Goodman.*

T. Christopher Kelly argued the cause for respondent in No. 04–104. With him on the brief was *Dean A. Strang. Rosemary Curran Scapicchio* argued the cause for respondent in No. 04–105. With her on the brief were *Carter G.*

Phillips, Jeffrey T. Green, Eric A. Shumsky, and *Martin G. Weinberg.*†

JUSTICE STEVENS delivered the opinion of the Court in part.*

The question presented in each of these cases is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment. In each case, the courts below held that binding rules set forth in the Guidelines limited the severity of the sentence that the judge could lawfully impose on the defendant based on the facts found by the jury at his trial. In both cases the courts rejected, on the basis of our decision in *Blakely* v. *Washington*, 542 U. S. 296 (2004), the Government's recommended application of the Sentencing Guidelines because the proposed sentences were based on additional facts that the sentencing judge found by a preponderance of the evidence. We hold that both courts correctly concluded that the Sixth Amendment as construed in

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†Briefs of *amici curiae* urging reversal in both cases were filed for the United States Sentencing Commission by *James K. Robinson, Charles R. Tetzlaff,* and *Pamela O. Barron;* and for the Honorable Orrin G. Hatch et al. by *Gregory G. Garre.*

Briefs of *amici curiae* urging affirmance in both cases were filed for Families Against Mandatory Minimums by *Gregory L. Poe, Roy T. Englert, Jr., Max Huffman,* and *Mary Price;* for the Federal Public Defender, Northern District of Texas, by *Ira R. Kirkendoll* and *Carlos R. Cardona;* for the National Association of Criminal Defense Lawyers by *Samuel J. Buffone, David O. Stewart, Thomas C. Goldstein, Amy Howe,* and *David M. Porter;* for the National Association of Federal Defenders by *Paul M. Rashkind, Carol A. Brook, Henry J. Bemporad,* and *Frances H. Pratt;* for the New York Council of Defense Lawyers by *Alexandra A. E. Shapiro* and *Lewis J. Liman;* for the Washington Legal Foundation et al. by *Donald B. Verrilli, Jr., Elaine J. Goldenberg, Daniel J. Popeo,* and *Paul D. Kamenar;* and for Thomas F. Liotti, by *Mr. Liotti, pro se.*

John S. Martin, Jr., filed a brief for an Ad Hoc Group of Former Federal Judges as *amici curiae* in both cases.

*JUSTICE SCALIA, JUSTICE SOUTER, JUSTICE THOMAS, and JUSTICE GINSBURG join this opinion.

Blakely does apply to the Sentencing Guidelines. In a separate opinion authored by JUSTICE BREYER, the Court concludes that in light of this holding, two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent.

I

Respondent Booker was charged with possession with intent to distribute at least 50 grams of cocaine base (crack). Having heard evidence that he had 92.5 grams in his duffel bag, the jury found him guilty of violating 21 U. S. C. § 841(a)(1). That statute prescribes a minimum sentence of 10 years in prison and a maximum sentence of life for that offense. § 841(b)(1)(A)(iii).

Based upon Booker's criminal history and the quantity of drugs found by the jury, the Sentencing Guidelines required the District Court Judge to select a "base" sentence of not less than 210 nor more than 262 months in prison. See United States Sentencing Commission, Guidelines Manual §§ 2D1.1(c)(4), 4A1.1 (Nov. 2003) (USSG). The judge, however, held a post-trial sentencing proceeding and concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Those findings mandated that the judge select a sentence between 360 months and life imprisonment; the judge imposed a sentence at the low end of the range. Thus, instead of the sentence of 21 years and 10 months that the judge could have imposed on the basis of the facts proved to the jury beyond a reasonable doubt, Booker received a 30-year sentence.

Over the dissent of Judge Easterbrook, the Court of Appeals for the Seventh Circuit held that this application of the Sentencing Guidelines conflicted with our holding in *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases

the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 375 F. 3d 508, 510 (2004). The majority relied on our holding in *Blakely*, 542 U. S. 296, that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.*, at 303. The court held that the sentence violated the Sixth Amendment, and remanded with instructions to the District Court either to sentence respondent within the sentencing range supported by the jury's findings or to hold a separate sentencing hearing before a jury.

Respondent Fanfan was charged with conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine in violation of 21 U. S. C. §§ 846, 841(a)(1), and 841(b)(1)(B)(ii). He was convicted by the jury after it answered "Yes" to the question "Was the amount of cocaine 500 or more grams?" App. C to Pet. for Cert. in No. 04–105, p. 15a. Under the Guidelines, without additional findings of fact, the maximum sentence authorized by the jury verdict was imprisonment for 78 months.

A few days after our decision in *Blakely*, the trial judge conducted a sentencing hearing at which he found additional facts that, under the Guidelines, would have authorized a sentence in the 188-to-235-month range. Specifically, he found that respondent Fanfan was responsible for 2.5 kilograms of cocaine powder, and 261.6 grams of crack. He also concluded that respondent had been an organizer, leader, manager, or supervisor in the criminal activity. Both findings were made by a preponderance of the evidence. Under the Guidelines, these additional findings would have required an enhanced sentence of 15 or 16 years instead of the 5 or 6 years authorized by the jury verdict alone. Relying not only on the majority opinion in *Blakely*, but also on the categorical statements in the dissenting opinions and in the Solic-

itor General's brief in *Blakely*, see App. A to Pet. for Cert. in No. 04–105, pp. 6a–7a, the judge concluded that he could not follow the particular provisions of the Sentencing Guidelines "which involve drug quantity and role enhancement," *id.*, at 11a. Expressly refusing to make "any blanket decision about the federal guidelines," he followed the provisions of the Guidelines that did not implicate the Sixth Amendment by imposing a sentence on respondent "based solely upon the jury verdict in this case." *Ibid.*

Following the denial of its motion to correct the sentence in Fanfan's case, the Government filed a notice of appeal in the Court of Appeals for the First Circuit, and a petition in this Court for a writ of certiorari before judgment. Because of the importance of the questions presented, we granted that petition, 542 U. S. 956 (2004), as well as a similar petition filed by the Government in Booker's case, *ibid.* In both petitions, the Government asks us to determine whether our *Apprendi* line of cases applies to the Sentencing Guidelines, and if so, what portions of the Guidelines remain in effect.[1]

In this opinion, we explain why we agree with the lower courts' answer to the first question. In a separate opinion for the Court, JUSTICE BREYER explains the Court's answer to the second question.

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[1] The questions presented are:

"1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

"2. If the answer to the first question is 'yes,' the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction." *E. g.*, Pet. for Cert. in No. 04–104, p. (I).

II

It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S. 358, 364 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States* v. *Gaudin*, 515 U. S. 506, 511 (1995). These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.

In *Jones* v. *United States*, 526 U. S. 227, 230 (1999), we considered the federal carjacking statute, which provides three different maximum sentences depending on the extent of harm to the victim: 15 years in jail if there was no serious injury to a victim, 25 years if there was "serious bodily injury," and life in prison if death resulted. 18 U. S. C. § 2119 (1988 ed., Supp. V). In spite of the fact that the statute "at first glance has a look to it suggesting [that the provisions relating to the extent of harm to the victim] are only sentencing provisions," 526 U. S., at 232, we concluded that the harm to the victim was an element of the crime. That conclusion was supported by the statutory text and structure, and was influenced by our desire to avoid the constitutional issues implicated by a contrary holding, which would have reduced the jury's role "to the relative importance of low-level gatekeeping." *Id.*, at 244. Foreshadowing the result we reach today, we noted that our holding was consistent with a "rule requiring jury determination of facts that raise a sentencing ceiling" in state and federal sentencing guidelines systems. *Id.*, at 251–252, n. 11.

In *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), the defendant pleaded guilty to second-degree possession of a firearm for an unlawful purpose, which carried a prison term

of 5-to-10 years. Thereafter, the trial court found that his conduct had violated New Jersey's "hate crime" law because it was racially motivated, and imposed a 12-year sentence. This Court set aside the enhanced sentence. We held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.*, at 490.

The fact that New Jersey labeled the hate crime a "sentence enhancement" rather than a separate criminal act was irrelevant for constitutional purposes. *Id.*, at 478. As a matter of simple justice, it seemed obvious that the procedural safeguards designed to protect Apprendi from punishment for the possession of a firearm should apply equally to his violation of the hate crime statute. Merely using the label "sentence enhancement" to describe the latter did not provide a principled basis for treating the two crimes differently. *Id.*, at 476.

In *Ring* v. *Arizona*, 536 U. S. 584 (2002), we reaffirmed our conclusion that the characterization of critical facts is constitutionally irrelevant. There, we held that it was impermissible for "the trial judge, sitting alone" to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty. *Id.*, at 588–589. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.*, at 602. Our opinion made it clear that ultimately, while the procedural error in Ring's case might have been harmless because the necessary finding was implicit in the jury's guilty verdict, *id.*, at 609, n. 7, "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury," *id.*, at 605.

In *Blakely* v. *Washington*, 542 U. S. 296 (2004), we dealt with a determinate sentencing scheme similar to the Federal

Sentencing Guidelines. There the defendant pleaded guilty to kidnaping, a class B felony punishable by a term of not more than 10 years. Other provisions of Washington law, comparable to the Federal Sentencing Guidelines, mandated a "standard" sentence of 49-to-53 months, unless the judge found aggravating facts justifying an exceptional sentence. Although the prosecutor recommended a sentence in the standard range, the judge found that the defendant had acted with "'deliberate cruelty'" and sentenced him to 90 months. *Id.*, at 300.

For reasons explained in *Jones*, *Apprendi*, and *Ring*, the requirements of the Sixth Amendment were clear. The application of Washington's sentencing scheme violated the defendant's right to have the jury find the existence of "'any particular fact'" that the law makes essential to his punishment. 542 U. S., at 301. That right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." *Id.*, at 303 (emphasis deleted). We rejected the State's argument that the jury verdict was sufficient to authorize a sentence within the general 10-year sentence for class B felonies, noting that under Washington law, the judge was *required* to find additional facts in order to impose the greater 90-month sentence. Our precedents, we explained, make clear "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Ibid.* (emphasis in original). The determination that the defendant acted with deliberate cruelty, like the determination in *Apprendi* that the defendant acted with racial malice, increased the sentence that the defendant could have otherwise received. Since this fact was found by a judge using a preponderance of the evidence standard, the sentence violated Blakely's Sixth Amendment rights.

As the dissenting opinions in *Blakely* recognized, there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case. See, *e. g.*, 542 U. S., at 325 (opinion of O'CONNOR, J.) ("The structure of the Federal Guidelines likewise does not, as the Government halfheartedly suggests, provide any grounds for distinction. . . . If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack"). This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges.

If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. See *Apprendi*, 530 U. S., at 481; *Williams* v. *New York*, 337 U. S. 241, 246 (1949). Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges; it is that circumstance that makes the Court's answer to the second question presented possible. For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.[2] While subsection

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[2] In *Mistretta* v. *United States*, 488 U. S. 361 (1989), we pointed out that Congress chose explicitly to adopt a "mandatory-guideline system" rather than a system that would have been "only advisory," and that the statute "makes the Sentencing Commission's guidelines binding on the courts." *Id.*, at 367.

(a) of § 3553 of the sentencing statute[3] lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court "*shall* impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures in specific, limited cases. (Emphasis added.) Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws. See, *e. g.*, *Mistretta* v. *United States*, 488 U. S. 361, 391 (1989); *Stinson* v. *United States*, 508 U. S. 36, 42 (1993).

The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself. The Guidelines permit departures from the prescribed sentencing range in cases in which the judge "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U. S. C. § 3553(b)(1) (2000 ed., Supp. IV). At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. It was for this reason that we rejected a similar argument in *Blakely*, holding that although the Washington statute allowed the judge to impose a sentence outside the sentencing range for "'substantial and compelling reasons,'" that exception was not available for Blakely himself. 542 U. S., at 299. The sentencing judge

[3] 18 U. S. C. § 3553(a) (2000 ed. and Supp. IV).

would have been reversed had he invoked the departure section to justify the sentence.

Booker's case illustrates the mandatory nature of the Guidelines. The jury convicted him of possessing at least 50 grams of crack in violation of 21 U. S. C. § 841(b)(1)(A)(iii) based on evidence that he had 92.5 grams of crack in his duffel bag. Under these facts, the Guidelines specified an offense level of 32, which, given the defendant's criminal history category, authorized a sentence of 210-to-262 months. See USSG § 2D1.1(c)(4). Booker's is a run-of-the-mill drug case, and does not present any factors that were inadequately considered by the Commission. The sentencing judge would therefore have been reversed had he not imposed a sentence within the level 32 Guidelines range.

Booker's actual sentence, however, was 360 months, almost 10 years longer than the Guidelines range supported by the jury verdict alone. To reach this sentence, the judge found facts beyond those found by the jury: namely, that Booker possessed 566 grams of crack in addition to the 92.5 grams in his duffel bag. The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just as in *Blakely*, "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." 542 U. S., at 305. There is no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines in these cases.

In his dissent, *post*, at 327–329, JUSTICE BREYER argues on historical grounds that the Guidelines scheme is constitutional across the board. He points to traditional judicial authority to increase sentences to take account of any unusual blameworthiness in the manner employed in committing a crime, an authority that the Guidelines require to be exercised consistently throughout the system. This tradition,

however, does not provide a sound guide to enforcement of the Sixth Amendment's guarantee of a jury trial in today's world.

It is quite true that once determinate sentencing had fallen from favor, American judges commonly determined facts justifying a choice of a heavier sentence on account of the manner in which particular defendants acted. *Apprendi*, 530 U. S., at 481. In 1986, however, our own cases first recognized a new trend in the legislative regulation of sentencing when we considered the significance of facts selected by legislatures that not only authorized, or even mandated, heavier sentences than would otherwise have been imposed, but increased the range of sentences possible for the underlying crime. See *McMillan* v. *Pennsylvania*, 477 U. S. 79, 87–88 (1986). Provisions for such enhancements of the permissible sentencing range reflected growing and wholly justified legislative concern about the proliferation and variety of drug crimes and their frequent identification with firearms offenses.

The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance.

As the enhancements became greater, the jury's finding of the underlying crime became less significant. And the enhancements became very serious indeed. See, *e. g.*, *Jones*, 526 U. S., at 230–231 (judge's finding increased the maximum sentence from 15 to 25 years); respondent Booker's case (from 262 months to a life sentence); respondent Fanfan's case (from 78 to 235 months); *United States* v. *Rodriguez*, 73 F. 3d 161, 162–163 (CA7 1996) (Posner, C. J., dissenting from denial of rehearing en banc) (from approximately 54 months to a life sentence); *United States* v. *Hammoud*, 381 F. 3d 316,

361–362 (CA4 2004) (en banc) (Motz, J., dissenting) (actual sentence increased from 57 months to 155 years).

As it thus became clear that sentencing was no longer taking place in the tradition that JUSTICE BREYER invokes, the Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in *Jones* and developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.

III

The Government advances three arguments in support of its submission that we should not apply our reasoning in *Blakely* to the Federal Sentencing Guidelines. It contends that *Blakely* is distinguishable because the Guidelines were promulgated by a Commission rather than the Legislature; that principles of *stare decisis* require us to follow four earlier decisions that are arguably inconsistent with *Blakely;* and that the application of *Blakely* to the Guidelines would conflict with separation-of-powers principles reflected in *Mistretta* v. *United States*, 488 U. S. 361 (1989). These arguments are unpersuasive.

Commission v. Legislature:

In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance. In order to impose the defendants' sentences under the Guidelines, the judges in these

cases were required to find an additional fact, such as drug quantity, just as the judge found the additional fact of serious bodily injury to the victim in *Jones*. As far as the defendants are concerned, they face significantly higher sentences—in Booker's case almost 10 years higher—because a judge found true by a preponderance of the evidence a fact that was never submitted to the jury. Regardless of whether Congress or a Sentencing Commission concluded that a particular fact must be proved in order to sentence a defendant within a particular range, "[t]he Framers would not have thought it too much to demand that, before depriving a man of [ten] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State." *Blakely*, 542 U. S., at 313–314 (citation omitted).

The Government correctly notes that in *Apprendi* we referred to "'any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* . . . .'" Brief for United States 15 (quoting *Apprendi*, 530 U. S., at 490 (emphasis in Brief for United States)). The simple answer, of course, is that we were only considering a statute in that case; we expressly declined to consider the Guidelines. See *Apprendi*, 530 U. S., at 497, n. 21. It was therefore appropriate to state the rule in that case in terms of a "statutory maximum" rather than answering a question not properly before us.

More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles are unquestionably applicable to the Guidelines. They are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law. See *Jones*, 526 U. S., at 244–248. The Framers of the Constitution understood the threat of "judicial despotism" that could arise from "arbitrary punishments upon arbitrary convic-

tions" without the benefit of a jury in criminal cases. The Federalist No. 83, p. 499 (C. Rossiter ed. 1961) (A. Hamilton). The Founders presumably carried this concern from England, in which the right to a jury trial had been enshrined since the Magna Carta. As we noted in *Apprendi:*

> "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that '*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .'" 530 U. S., at 477 (citations omitted).

Regardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable.

Stare Decisis:

The Government next argues that four recent cases preclude our application of *Blakely* to the Sentencing Guidelines. We disagree. In *United States* v. *Dunnigan,* 507 U. S. 87 (1993), we held that the provisions of the Guidelines that require a sentence enhancement if the judge determines that the defendant committed perjury do not violate the privilege of the accused to testify on her own behalf. There was no contention that the enhancement was invalid because it resulted in a more severe sentence than the jury verdict had authorized. Accordingly, we found this case indistinguishable from *United States* v. *Grayson,* 438 U. S. 41 (1978), a pre-Guidelines case in which we upheld a similar sentence increase. Applying *Blakely* to the Guidelines would invali-

date a sentence that relied on such an enhancement if the resulting sentence was outside the range authorized by the jury verdict. Nevertheless, there are many situations in which the district judge might find that the enhancement is warranted, yet still sentence the defendant within the range authorized by the jury. See *post*, at 276–279 (STEVENS, J., dissenting in part). Thus, while the reach of *Dunnigan* may be limited, we need not overrule it.

In *Witte* v. *United States*, 515 U. S. 389 (1995), we held that the Double Jeopardy Clause did not bar a prosecution for conduct that had provided the basis for an enhancement of the defendant's sentence in a prior case. "We concluded that 'consideration of information about the defendant's character and conduct at sentencing does not result in "punishment" for any offense other than the one of which the defendant was convicted.' Rather, the defendant is 'punished only for the fact that the present offense was carried out in a manner that warrants increased punishment . . . .'" *United States* v. *Watts*, 519 U. S. 148, 155 (1997) *(per curiam)* (quoting *Witte*, 515 U. S., at 401, 403; emphasis deleted). In *Watts*, relying on *Witte*, we held that the Double Jeopardy Clause permitted a court to consider acquitted conduct in sentencing a defendant under the Guidelines. In neither *Witte* nor *Watts* was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment. The issue we confront today simply was not presented.[4]

Finally, in *Edwards* v. *United States*, 523 U. S. 511 (1998), the Court held that a jury's general verdict finding the defendants guilty of a conspiracy involving either cocaine or crack supported a sentence based on their involvement with

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[4] *Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases. See 519 U. S., at 171 (KENNEDY, J., dissenting).

both drugs. Even though the indictment had charged that their conspiracy embraced both, they argued on appeal that the verdict limited the judge's sentencing authority. We recognized that the defendants' statutory and constitutional claims might have had merit if it had been possible to argue that their crack-related activities were not part of the same conspiracy as their cocaine activities. But they failed to make that argument, and, based on our review of the record which showed "a series of interrelated drug transactions involving both cocaine and crack," we concluded that no such claim could succeed.[5] *Id.*, at 515.

None of our prior cases is inconsistent with today's decision. *Stare decisis* does not compel us to limit *Blakely*'s holding.

Separation of Powers:

Finally, the Government and, to a lesser extent, JUSTICE BREYER's dissent, argue that any holding that would require Guidelines sentencing factors to be proved to a jury beyond a reasonable doubt would effectively transform them into a code defining elements of criminal offenses. The result, according to the Government, would be an unconstitutional grant to the Sentencing Commission of the inherently legislative power to define criminal elements.

There is no merit to this argument because the Commission's authority to identify the facts relevant to sentencing

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[5] We added: "Instead, petitioners argue that the judge *might* have made different factual findings if only the judge had known that the law required him to assume the jury had found a cocaine-only, not a cocaine-and-crack, conspiracy. It is sufficient for present purposes, however, to point out that petitioners did not make this particular argument in the District Court. Indeed, they seem to have raised their entire argument for the first time in the Court of Appeals. Thus, petitioners did not explain to the sentencing judge how their 'jury-found-only-cocaine' assumption could have made a difference to the judge's own findings, nor did they explain how this assumption (given the judge's findings) should lead to greater leniency." *Edwards*, 523 U. S., at 515–516.

decisions and to determine the impact of such facts on federal sentences is precisely the same whether one labels such facts "sentencing factors" or "elements" of crimes. Our decision in *Mistretta*, 488 U. S., at 371, upholding the validity of the delegation of that authority, is unaffected by the characterization of such facts, or by the procedures used to find such facts in particular sentencing proceedings. Indeed, we rejected a similar argument in *Jones:*

> "Contrary to the dissent's suggestion, the constitutional proposition that drives our concern in no way 'call[s] into question the principle that the definition of the elements of a criminal offense is entrusted to the legislature.' The constitutional guarantees that give rise to our concern in no way restrict the ability of legislatures to identify the conduct they wish to characterize as criminal or to define the facts whose proof is essential to the establishment of criminal liability. The constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof." 526 U. S., at 243, n. 6 (citation omitted).

Our holding today does not call into question any aspect of our decision in *Mistretta*. That decision was premised on an understanding that the Commission, rather than performing adjudicatory functions, instead makes political and substantive decisions. 488 U. S., at 393. We noted that the promulgation of the Guidelines was much like other activities in the Judicial Branch, such as the creation of the Federal Rules of Evidence, all of which are nonadjudicatory activities. *Id.*, at 387. We also noted that "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and

that are appropriate to the central mission of the Judiciary." *Id.*, at 388. While we recognized that the Guidelines were more substantive than the Rules of Evidence or other nonadjudicatory functions delegated to the Judicial Branch, we nonetheless concluded that such a delegation did not exceed Congress' powers.

Further, a recognition that the Commission did not exercise judicial authority, but was more properly thought of as exercising some sort of legislative power, *ibid.*, was essential to our holding. If the Commission in fact performed adjudicatory functions, it would have violated Article III because some of the members were not Article III judges. As we explained:

> "[T]he 'practical consequences' of locating the Commission within the Judicial Branch pose no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts. [The Commission's] powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis. Whatever constitutional problems might arise if the powers of the Commission were vested in a court, the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch." *Id.*, at 393.

We have thus always recognized the fact that the Commission is an independent agency that exercises policymaking authority delegated to it by Congress. Nothing in our holding today is inconsistent with our decision in *Mistretta*.

IV

All of the foregoing supports our conclusion that our holding in *Blakely* applies to the Sentencing Guidelines. We

recognize, as we did in *Jones*, *Apprendi*, and *Blakely*, that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly. *Blakely*, 542 U. S., at 313. As Blackstone put it:

> "[H]owever *convenient* these [new methods of trial] may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concerns." 4 Commentaries on the Laws of England 343–344 (1769).

Accordingly, we reaffirm our holding in *Apprendi:* Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

JUSTICE BREYER delivered the opinion of the Court in part.*

The first question that the Government has presented in these cases is the following:

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*THE CHIEF JUSTICE, JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE GINSBURG join this opinion.

> "Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant." Pet. for Cert. in No. 04–104, p. (I).

The Court, in an opinion by JUSTICE STEVENS, answers this question in the affirmative. Applying its decisions in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and *Blakely* v. *Washington*, 542 U. S. 296 (2004), to the Federal Sentencing Guidelines, the Court holds that, in the circumstances mentioned, the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing. See *ante*, at 226–227, 244 (STEVENS, J., opinion of the Court).

We here turn to the second question presented, a question that concerns the remedy. We must decide whether or to what extent, "as a matter of severability analysis," the Guidelines "as a whole" are "inapplicable . . . such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction." Pet. for Cert. in No. 04–104, p. (I).

We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U. S. C. § 3553(b)(1) (Supp. IV), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e) (2000 ed. and Supp. IV), which depends upon the Guidelines' mandatory nature. So modified, the federal sentencing statute, see Sentencing Reform Act of 1984 (Sentencing Act), as amended, 18 U. S. C. § 3551 *et seq.*, 28 U. S. C. § 991 *et seq.*, makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U. S. C. § 3553(a)(4) (Supp. IV), but it permits the court to tailor the

sentence in light of other statutory concerns as well, see § 3553(a).

I

We answer the remedial question by looking to legislative intent. See, *e. g.*, *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 191 (1999); *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987); *Regan* v. *Time, Inc.*, 468 U. S. 641, 653 (1984) (plurality opinion). We seek to determine what "Congress would have intended" in light of the Court's constitutional holding. *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 767 (1996) (plurality opinion) ("Would Congress still have passed" the valid sections "had it known" about the constitutional invalidity of the other portions of the statute? (internal quotation marks omitted)). In this instance, we must determine which of the two following remedial approaches is the more compatible with the Legislature's intent as embodied in the 1984 Sentencing Act.

One approach, that of JUSTICE STEVENS' dissent, would retain the Sentencing Act (and the Guidelines) as written, but would engraft onto the existing system today's Sixth Amendment "jury trial" requirement. The addition would change the Guidelines by preventing the sentencing court from increasing a sentence on the basis of a fact that the jury did not find (or that the offender did not admit).

The other approach, which we now adopt, would (through severance and excision of two provisions) make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.

Both approaches would significantly alter the system that Congress designed. But today's constitutional holding means that it is no longer possible to maintain the judicial factfinding that Congress thought would underpin the man-

datory Guidelines system that it sought to create and that Congress wrote into the Act in 18 U. S. C. §§ 3553(a) and 3661 (2000 ed. and Supp. IV). Hence we must decide whether we would deviate less radically from Congress' intended system (1) by superimposing the constitutional requirement announced today or (2) through elimination of some provisions of the statute.

To say this is not to create a new kind of severability analysis. *Post*, at 291 (STEVENS, J., dissenting in part). Rather, it is to recognize that sometimes severability questions (questions as to how, or whether, Congress would intend a statute to apply) can arise when a legislatively unforeseen constitutional problem requires modification of a statutory provision as applied in a significant number of instances. Compare, *e. g.*, *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result) (explaining that when a statute is defective because of its failure to extend to some group a constitutionally required benefit, the court may "either declare it a nullity" or "extend" the benefit "to include those who are aggrieved by exclusion"); *Heckler* v. *Mathews*, 465 U. S. 728, 739, n. 5 (1984) ("Although . . . ordinarily 'extension, rather than nullification, is the proper course,' the court should not, of course, 'use its remedial powers to circumvent the intent of the legislature . . .'" (quoting *Califano* v. *Westcott*, 443 U. S. 76, 89 (1979), and *id.*, at 94 (Powell, J., concurring in part and dissenting in part))); *Sloan* v. *Lemon*, 413 U. S. 825, 834 (1973) (striking down entire Pennsylvania tuition reimbursement statute because to eliminate only unconstitutional applications "would be to create a program quite different from the one the legislature actually adopted"). See also *post*, at 320, 323 (THOMAS, J., dissenting in part) ("[S]everability questions" can "arise from unconstitutional applications" of statutes, and such a question "is squarely presented" here); Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1950, n. 26 (1997).

In today's context—a highly complex statute, interrelated provisions, and a constitutional requirement that creates fundamental change—we cannot assume that Congress, if faced with the statute's invalidity in key applications, would have preferred to apply the statute in as many other instances as possible. Neither can we determine likely congressional intent mechanically. We cannot simply approach the problem grammatically, say, by looking to see whether the constitutional requirement and the words of the Act are linguistically compatible.

Nor do simple numbers provide an answer. It is, of course, true that the numbers show that the constitutional jury trial requirement would lead to additional decisionmaking by juries in only a minority of cases. See *post*, at 277 (STEVENS, J., dissenting in part). Prosecutors and defense attorneys would still resolve the lion's share of criminal matters through plea bargaining, and plea bargaining takes place without a jury. See *ibid.* Many of the rest involve only simple issues calling for no upward Guidelines adjustment. See *post*, at 275. And in at least some of the remainder, a judge may find adequate room to adjust a sentence within the single Guidelines range to which the jury verdict points, or within the overlap between that range and the next highest. See *post*, at 278–279.

But the constitutional jury trial requirement would nonetheless affect every case. It would affect decisions about whether to go to trial. It would affect the content of plea negotiations. It would alter the judge's role in sentencing. Thus we must determine likely intent not by counting proceedings, but by evaluating the consequences of the Court's constitutional requirement in light of the Act's language, its history, and its basic purposes.

While reasonable minds can, and do, differ about the outcome, we conclude that the constitutional jury trial requirement is not compatible with the Act as written and that some severance and excision are necessary. In Part II, *infra*, we

explain the incompatibility. In Part III, *infra*, we describe the necessary excision. In Part IV, *infra*, we explain why we have rejected other possibilities. In essence, in what follows, we explain both (1) why Congress would likely have preferred the total invalidation of the Act to an Act with the Court's Sixth Amendment requirement engrafted onto it, and (2) why Congress would likely have preferred the excision of some of the Act, namely the Act's mandatory language, to the invalidation of the entire Act. That is to say, in light of today's holding, we compare maintaining the Act as written with jury factfinding added (the dissenters' proposed remedy) to the total invalidation of the statute, and conclude that Congress would have preferred the latter. We then compare our own remedy to the total invalidation of the statute, and conclude that Congress would have preferred our remedy.

II

Several considerations convince us that, were the Court's constitutional requirement added onto the Sentencing Act as currently written, the requirement would so transform the scheme that Congress created that Congress likely would not have intended the Act as so modified to stand. First, the statute's text states that "[t]he court" when sentencing will consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U. S. C. §3553(a)(1) (2000 ed. and Supp. IV). In context, the words "the court" mean "the judge without the jury," not "the judge working together with the jury." A further statutory provision, by removing typical "jury trial" evidentiary limitations, makes this clear. See §3661 (ruling out any "limitation . . . on the information concerning the [offender's] background, character, and conduct" that the "court . . . may receive"). The Act's history confirms it. See, *e. g.*, S. Rep. No. 98–225, p. 51 (1983) (the Guidelines system "will guide *the judge* in making" sentencing decisions (emphasis added)); *id.*, at 52 (before sentencing, "the judge"

must consider "the nature and circumstances of the offense"); *id.*, at 53 ("the judge" must conduct "a comprehensive examination of the characteristics of the particular offense and the particular offender").

This provision is tied to the provision of the Act that makes the Guidelines mandatory, see § 3553(b)(1) (2000 ed., Supp. IV). They are part and parcel of a single, unified whole—a whole that Congress intended to apply to all federal sentencing.

This provision makes it difficult to justify JUSTICE STEVENS' approach, for that approach requires reading the words "the court" as if they meant "the judge working together with the jury." Unlike JUSTICE STEVENS, we do not believe we can interpret the statute's language to save its constitutionality, see *post*, at 286 (opinion dissenting in part), because we believe that any such reinterpretation, even if limited to instances in which a Sixth Amendment problem arises, would be "plainly contrary to the intent of Congress." *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 78 (1994). Without some such reinterpretation, however, this provision of the statute, along with those inextricably connected to it, are constitutionally invalid, and fall outside of Congress' power to enact. Nor can we agree with JUSTICE STEVENS that a newly passed "identical statute" would be valid, *post*, at 283 (opinion dissenting in part). Such a new, identically worded statute would be valid only if (unlike the present statute) we could interpret that new statute (without disregarding Congress' basic intent) as being consistent with the Court's jury factfinding requirement. Compare *post*, at 283–284 (STEVENS, J., dissenting in part). If so, the statute would stand.

Second, Congress' basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction. That determination is particularly important in the federal

system where crimes defined as, for example, "obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, by . . . extortion," 18 U. S. C. § 1951(a), or, say, using the mail "for the purpose of executing" a "scheme or artifice to defraud," § 1341 (2000 ed., Supp. II), can encompass a vast range of very different kinds of underlying conduct. But it is also important even in respect to ordinary crimes, such as robbery, where an act that meets the statutory definition can be committed in a host of different ways. Judges have long looked to real conduct when sentencing. Federal judges have long relied upon a presentence report, prepared by a probation officer, for information (often unavailable until *after* the trial) relevant to the manner in which the convicted offender committed the crime of conviction.

Congress expected this system to continue. That is why it specifically inserted into the Act the provision cited above, which (recodifying prior law) says that

> "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U. S. C. § 3661.

This Court's earlier opinions assumed that this system would continue. That is why the Court, for example, held in *United States* v. *Watts*, 519 U. S. 148 (1997) *(per curiam)*, that a sentencing judge could rely for sentencing purposes upon a fact that a jury had found *unproved* (beyond a reasonable doubt). See *id.*, at 157; see also *id.*, at 152–153 (quoting United States Sentencing Commission, Guidelines Manual § 1B1.3, comment., backg'd (Nov. 1995) (USSG), which "describes in sweeping language the conduct that a sentencing court may consider in determining the applicable guideline range," and which provides that " '[c]onduct that is not formally charged or is not an element of the offense of con-

viction may enter into the determination of the applicable guideline sentencing range' ").

The Sentencing Guidelines also assume that Congress intended this system to continue. See USSG §1B1.3, comment., backg'd (Nov. 2003). That is why, among other things, they permit a judge to reject a plea-bargained sentence if he determines, after reviewing the presentence report, that the sentence does not adequately reflect the seriousness of the defendant's actual conduct. See §6B1.2(a).

To engraft the Court's constitutional requirement onto the sentencing statutes, however, would destroy the system. It would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial. In doing so, it would, even compared to pre-Guidelines sentencing, weaken the tie between a sentence and an offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.

Several examples help illustrate the point. Imagine Smith and Jones, each of whom violates the Hobbs Act in very different ways. See 18 U. S. C. §1951(a) (forbidding "obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, by . . . extortion"). Smith threatens to injure a co-worker unless the co-worker advances him a few dollars from the interstate company's till; Jones, after similarly threatening the co-worker, causes far more harm by seeking far more money, by making certain that the co-worker's family is aware of the threat, by arranging for deliveries of dead animals to the co-worker's home to show he is serious, and so forth. The offenders' behavior is very different; the known harmful consequences of their actions are different; their punishments both before, and after, the Guidelines would have been different. But, under the dissenters' approach, unless prosecutors decide to charge more than the elements of the crime,

the judge would have to impose similar punishments. See, *e. g.*, *post*, at 303–304 (SCALIA, J., dissenting in part).

Now imagine two former felons, Johnson and Jackson, each of whom engages in identical criminal behavior: threatening a bank teller with a gun, securing $50,000, and injuring an innocent bystander while fleeing the bank. Suppose prosecutors charge Johnson with one crime (say, illegal gun possession, see 18 U. S. C. § 922(g)) and Jackson with another (say, bank robbery, see § 2113(a)). Before the Guidelines, a single judge faced with such similar real conduct would have been able (within statutory limits) to impose similar sentences upon the two similar offenders despite the different charges brought against them. The Guidelines themselves would ordinarily have required judges to sentence the two offenders similarly. But under the dissenters' system, in these circumstances the offenders likely would receive different punishments. See, *e. g.*, *post*, at 303–304 (SCALIA, J., dissenting in part).

Consider, too, a complex mail fraud conspiracy where a prosecutor may well be uncertain of the amount of harm and of the role each indicted individual played until after conviction—when the offenders may turn over financial records, when it becomes easier to determine who were the leaders and who the followers, when victim interviews are seen to be worth the time. In such a case the relation between the sentence and what actually occurred is likely to be considerably more distant under a system with a jury trial requirement patched onto it than it was even prior to the Sentencing Act, when judges routinely used information obtained after the verdict to decide upon a proper sentence.

This point is critically important. Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. See 28 U. S. C. § 991(b)(1)(B); see also § 994(f). That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute—a uniformity consistent with the

dissenters' remedial approach. It consists, more importantly, of similar relationships between sentences and real conduct, relationships that Congress' sentencing statutes helped to advance and that JUSTICE STEVENS' approach would undermine. Compare *post*, at 288 (opinion dissenting in part) (conceding that the Sixth Amendment requirement would "undoubtedly affect 'real conduct' sentencing in certain cases," but minimizing the significance of that circumstance). In significant part, it is the weakening of this real-conduct/uniformity-in-sentencing relationship, and not any "[i]nexplicabl[e]" concerns for the "*manner* of achieving uniform sentences," *post*, at 304 (SCALIA, J., dissenting in part), that leads us to conclude that Congress would have preferred *no* mandatory system to the system the dissenters envisage.

Third, the sentencing statutes, read to include the Court's Sixth Amendment requirement, would create a system far more complex than Congress could have intended. How would courts and counsel work with an indictment and a jury trial that involved not just whether a defendant robbed a bank but also how? Would the indictment have to allege, in addition to the elements of robbery, whether the defendant possessed a firearm, whether he brandished or discharged it, whether he threatened death, whether he caused bodily injury, whether any such injury was ordinary, serious, permanent or life threatening, whether he abducted or physically restrained anyone, whether any victim was unusually vulnerable, how much money was taken, and whether he was an organizer, leader, manager, or supervisor in a robbery gang? See USSG §§2B3.1, 3B1.1. If so, how could a defendant mount a defense against some or all such specific claims should he also try simultaneously to maintain that the Government's evidence failed to place him at the scene of the crime? Would the indictment in a mail fraud case have to allege the number of victims, their vulnerability, and the amount taken from each? How could a judge expect a jury to work with the Guidelines' definitions of, say, "relevant con-

duct," which includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and [in the case of a conspiracy] all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity"? §§1B1.3(a)(1)(A)–(B). How would a jury measure "loss" in a securities fraud case—a matter so complex as to lead the Commission to instruct judges to make "only . . . a reasonable estimate"? §2B1.1, comment., n. 3(C). How would the court take account, for punishment purposes, of a defendant's contemptuous behavior at trial—a matter that the Government could not have charged in the indictment? §3C1.1.

Fourth, plea bargaining would not significantly diminish the consequences of the Court's constitutional holding for the operation of the Guidelines. Compare *post*, at 273–274 (STEVENS, J., dissenting in part). Rather, plea bargaining would make matters worse. Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing, *i. e.*, to increase the likelihood that offenders who engage in similar real conduct would receive similar sentences. The statutes reasonably assume that their efforts to move the trial-based sentencing process in the direction of greater sentencing uniformity would have a similar positive impact upon plea-bargained sentences, for plea bargaining takes place *in the shadow of* (*i. e.*, with an eye toward the hypothetical result of) a potential trial.

That, too, is why Congress, understanding the realities of plea bargaining, authorized the Commission to promulgate policy statements that would assist sentencing judges in determining whether to reject a plea agreement after reading about the defendant's real conduct in a presentence report (and giving the offender an opportunity to challenge the report). See 28 U. S. C. §994(a)(2)(E); USSG §6B1.2(a), p. s. This system has not worked perfectly; judges have often simply accepted an agreed-upon account of the conduct at

issue. But compared to pre-existing law, the statutes try to move the system in the right direction, *i. e.*, toward greater sentencing uniformity.

The Court's constitutional jury trial requirement, however, if patched onto the present Sentencing Act, would move the system backwards in respect both to tried and to plea-bargained cases. In respect to tried cases, it would effectively deprive the judge of the ability to use post-verdict-acquired real-conduct information; it would prohibit the judge from basing a sentence upon any conduct other than the conduct the prosecutor chose to charge; and it would put a defendant to a set of difficult strategic choices as to which prosecutorial claims he would contest. The sentence that would emerge in a case tried under such a system would likely reflect real conduct less completely, less accurately, and less often than did a pre-Guidelines, as well as a Guidelines, trial.

Because plea bargaining inevitably reflects estimates of what would happen at trial, plea bargaining too under such a system would move in the wrong direction. That is to say, in a sentencing system modified by the Court's constitutional requirement, plea bargaining would likely lead to sentences that gave greater weight not to real conduct, but rather to the skill of counsel, the policies of the prosecutor, the case-load, and other factors that vary from place to place, defendant to defendant, and crime to crime. Compared to pre-Guidelines plea bargaining, plea bargaining of this kind would necessarily move federal sentencing in the direction of diminished, not increased, uniformity in sentencing. Compare *supra*, at 250–252, with *post*, at 288 (STEVENS, J., dissenting in part). It would tend to defeat, not to further, Congress' basic statutory goal.

Such a system would have particularly troubling consequences with respect to prosecutorial power. Until now, sentencing factors have come before the judge in the presentence report. But in a sentencing system with the Court's

constitutional requirement engrafted onto it, any factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely. Prosecutors would thus exercise a power the Sentencing Act vested in judges: the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment.

In respondent Booker's case, for example, the jury heard evidence that the crime had involved 92.5 grams of crack cocaine, and convicted Booker of possessing more than 50 grams. But the judge, at sentencing, found that the crime had involved an additional 566 grams, for a total of 658.5 grams. A system that would require the jury, not the judge, to make the additional "566 grams" finding is a system in which the prosecutor, not the judge, would control the sentence. That is because it is the prosecutor who would have to decide what drug amount to charge. He could choose to charge 658.5 grams, or 92.5, or less. It is the prosecutor who, through such a charging decision, would control the sentencing range. And it is different prosecutors who, in different cases—say, in two cases involving 566 grams—would potentially insist upon different punishments for similar defendants who engaged in similar criminal conduct involving similar amounts of unlawful drugs—say, by charging one of them with the full 566 grams, and the other with 10. As long as different prosecutors react differently, a system with a patched-on jury factfinding requirement would mean different sentences for otherwise similar conduct, whether in the context of trials or that of plea bargaining.

Fifth, Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward*. As several United States Senators have written in an *amicus* brief, "the Congress that enacted the 1984 Act did not conceive of—much less establish—a sentencing guidelines system in which sentencing judges were free to consider facts or circumstances not found

by a jury or admitted in a plea agreement for the purpose of adjusting a base-offense level *down*, but not *up*, within the applicable guidelines range. Such a one-way lever would be grossly at odds with Congress's intent." Brief for Sen. Orrin G. Hatch et al. as *Amici Curiae* 22. Yet that is the system that the dissenters' remedy would create. Compare *post*, at 291 (STEVENS, J., dissenting in part) (conceding asymmetry but stating belief that this "is unlikely to have more than a minimal effect").

For all these reasons, Congress, had it been faced with the constitutional jury trial requirement, likely would not have passed the same Sentencing Act. It likely would have found the requirement incompatible with the Act as written. Hence the Act cannot remain valid in its entirety. Severance and excision are necessary.

III

We now turn to the question of *which* portions of the sentencing statute we must sever and excise as inconsistent with the Court's constitutional requirement. Although, as we have explained, see Part II, *supra*, we believe that Congress would have preferred the total invalidation of the statute to the dissenters' remedial approach, we nevertheless do not believe that the entire statute must be invalidated. Compare *post*, at 292 (STEVENS, J., dissenting in part). Most of the statute is perfectly valid. See, *e. g.*, 18 U. S. C. § 3551 (2000 ed. and Supp. IV) (describing authorized sentences as probation, fine, or imprisonment); § 3552 (presentence reports); § 3554 (forfeiture); § 3555 (notification to the victims); § 3583 (supervised release). And we must "refrain from invalidating more of the statute than is necessary." *Regan*, 468 U. S., at 652 (plurality opinion). Indeed, we must retain those portions of the Act that are (1) constitutionally valid, *id.*, at 652–653, (2) capable of "functioning independently," *Alaska Airlines*, 480 U. S., at 684,

and (3) consistent with Congress' basic objectives in enacting the statute, *Regan*, *supra*, at 653.

Application of these criteria indicates that we must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), see 18 U. S. C. § 3553(b)(1) (2000 ed., Supp. IV), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, see § 3742(e) (2000 ed. and Supp. IV) (see Appendix, *infra*, for text of both provisions). With these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements.

As the Court today recognizes in its first opinion in these cases, the existence of § 3553(b)(1) is a necessary condition of the constitutional violation. That is to say, without this provision—namely, the provision that makes "the relevant sentencing rules . . . mandatory and impose[s] binding requirements on all sentencing judges"—the statute falls outside the scope of *Apprendi*'s requirement. *Ante*, at 233 (STEVENS, J., opinion of the Court); see also *ibid.* ("[E]veryone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges"). Cf. *post*, at 314–320 (THOMAS, J., dissenting in part).

The remainder of the Act "function[s] independently." *Alaska Airlines*, *supra*, at 684. Without the "mandatory" provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. See 18 U. S. C. § 3553(a) (2000 ed., Supp. IV). The Act nonetheless requires judges to consider the Guidelines "sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,"

§ 3553(a)(4)(A), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)–(7) (2000 ed. and Supp. IV). And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. § 3553(a)(2) (2000 ed. and Supp. IV) (see Appendix, *infra*, for text of § 3553(a)).

Moreover, despite the absence of § 3553(b)(1) (Supp. 2004), the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a)). See § 3742(a) (2000 ed.) (appeal by defendant); § 3742(b) (appeal by Government). We concede that the excision of § 3553(b)(1) requires the excision of a different, appeals-related section, namely, § 3742(e) (2000 ed. and Supp. IV), which sets forth standards of review on appeal. That section contains critical cross-references to the (now-excised) § 3553(b)(1) and consequently must be severed and excised for similar reasons.

Excision of § 3742(e), however, does not pose a critical problem for the handling of appeals. That is because, as we have previously held, a statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly*. See *Pierce* v. *Underwood*, 487 U. S. 552, 558–560 (1988) (adopting a standard of review, where "neither a clear statutory prescription nor a historical tradition" existed, based on the statutory text and structure, and on practical considerations); see also *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 403–405 (1990) (same); *Koon* v. *United States*, 518 U. S. 81, 99 (1996) (citing *Pierce* and *Cooter & Gell* with approval). We infer appropriate review standards from related statutory language, the structure of the statute, and the "'sound

administration of justice.'" *Pierce, supra,* at 559–560. And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for "unreasonable[ness]." 18 U. S. C. § 3742(e)(3) (1994 ed.).

Until 2003, § 3742(e) explicitly set forth that standard. See § 3742(e)(3) (1994 ed.). In 2003, Congress modified the pre-existing text, adding a *de novo* standard of review for departures and inserting cross-references to § 3553(b)(1). Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21, § 401(d)(1), 117 Stat. 670. In light of today's holding, the reasons for these revisions—to make Guidelines sentencing even more mandatory than it had been—have ceased to be relevant. The pre-2003 text directed appellate courts to review sentences that reflected an applicable Guidelines range for correctness, but to review other sentences—those that fell "outside the applicable Guideline range"—with a view toward determining whether such a sentence

> "*is unreasonable,* having regard for . . . the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and . . . the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)." 18 U. S. C. § 3742(e)(3) (1994 ed.) (emphasis added).

In other words, the text told appellate courts to determine whether the sentence "is unreasonable" with regard to § 3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.

Taking into account the factors set forth in *Pierce,* we read the statute as implying this appellate review standard—a

standard consistent with appellate sentencing practice during the last two decades. JUSTICE SCALIA believes that only in "Wonderland" is it possible to infer a standard of review after excising § 3742(e). See *post*, at 309 (opinion dissenting in part). But our application of *Pierce* does not justify that characterization. *Pierce* requires us to judge the appropriateness of our inference based on the statute's language and basic purposes. We believe our inference a fair one linguistically, and one consistent with Congress' intent to provide appellate review. Under these circumstances, to refuse to apply *Pierce* and thereby retreat to a remedy that raises the problems discussed in Part II, *supra* (as the dissenters would do), or thereby eliminate appellate review entirely, would cut the statute loose from its moorings in congressional purpose.

Nor do we share the dissenters' doubts about the practicality of a "reasonableness" standard of review. "Reasonableness" standards are not foreign to sentencing law. The Act has long required their use in important sentencing circumstances—both on review of departures, see 18 U. S. C. § 3742(e)(3) (1994 ed.), and on review of sentences imposed where there was no applicable Guideline, see §§ 3742(a)(4), (b)(4), (e)(4). Together, these cases account for about 16.7% of sentencing appeals. See United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics 107, n. 1, 111 (at least 711 of 5,018 sentencing appeals involved departures), 108 (at least 126 of 5,018 sentencing appeals involved the imposition of a term of imprisonment after the revocation of supervised release). See also, *e. g.*, *United States* v. *White Face*, 383 F. 3d 733, 737–740 (CA8 2004); *United States* v. *Tsosie*, 376 F. 3d 1210, 1218–1219 (CA10 2004); *United States* v. *Salinas*, 365 F. 3d 582, 588–590 (CA7 2004); *United States* v. *Cook*, 291 F. 3d 1297, 1300–1302 (CA11 2002 *(per curiam)*; *United States* v. *Olabanji*, 268 F. 3d 636, 637–639 (CA9 2001); *United States* v. *Ramirez-Rivera*, 241 F. 3d 37, 40–41 (CA1 2001). That is why we think it fair (and not, in JUSTICE SCALIA's words, a "gross exaggera-

tio[n]," *post*, at 311 (opinion dissenting in part)) to assume judicial familiarity with a "reasonableness" standard. And that is why we believe that appellate judges will prove capable of facing with greater equanimity than would JUSTICE SCALIA what he calls the "daunting prospect," *post*, at 312, of applying such a standard across the board.

Neither do we share JUSTICE SCALIA's belief that use of a reasonableness standard "will produce a discordant symphony" leading to "excessive sentencing disparities," and "wreak havoc" on the judicial system, *post*, at 312–313 (internal quotation marks omitted). The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process. 28 U. S. C. § 994 (2000 ed. and Supp. IV).

Regardless, in this context, we must view fears of a "discordant symphony," "excessive disparities," and "havoc" (if they are not themselves "gross exaggerations") with a comparative eye. We cannot and do not claim that use of a "reasonableness" standard will provide the uniformity that Congress originally sought to secure. Nor do we doubt that Congress wrote the language of the appellate provisions to correspond with the mandatory system it intended to create. Compare *post*, at 306–307 (SCALIA, J., dissenting in part) (expressing concern regarding the presence of § 3742(f) in light of the absence of § 3742(e)). But, as by now should be clear, that mandatory system is no longer an open choice. And the remedial question we must ask here (as we did in respect to § 3553(b)(1)) is, which alternative adheres more closely to Congress' original objective: (1) retention of sentencing appeals, or (2) invalidation of the entire Act, including its appellate provisions? The former, by providing appellate review, would tend to iron out sentencing differences; the latter would not. Hence we believe Congress would have pre-

ferred the former to the latter—even if the former means that some provisions will apply differently from the way Congress had originally expected. See *post*, at 306–307 (SCALIA, J., dissenting in part). But, as we have said, we believe that Congress would have preferred even the latter to the system the dissenters recommend, a system that has its own problems of practicality. See *supra*, at 254–256.

Finally, the Act without its "mandatory" provision and related language remains consistent with Congress' initial and basic sentencing intent. Congress sought to "provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted." 28 U. S. C. § 991(b)(1)(B); see also USSG § 1A1.1, application note (explaining that Congress sought to achieve "honesty," "uniformity," and "proportionality" in sentencing (emphasis deleted)). The system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives.

As we have said, the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. See 28 U. S. C. § 994 (2000 ed. and Supp. IV). The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing. See 18 U. S. C. A. §§ 3553(a)(4), (5) (Supp. 2004). But compare *post*, at 305 (SCALIA, J., dissenting in part) (claiming that the sentencing judge has the same discretion "he possessed before the Act was passed"). The courts of appeals review sentencing decisions for unreasonableness. These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to

individualize sentences where necessary. See 28 U. S. C. § 991(b). We can find no feature of the remaining system that tends to hinder, rather than to further, these basic objectives. Under these circumstances, why would Congress not have preferred excision of the "mandatory" provision to a system that engrafts today's constitutional requirement onto the unchanged pre-existing statute—a system that, in terms of Congress' basic objectives, is counterproductive?

We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system. See *post*, at 291–296 (STEVENS, J., dissenting in part). But, we repeat, given today's constitutional holding, that is not a choice that remains open. Hence we have examined the statute in depth to determine Congress' likely intent *in light of today's holding.* See, *e. g., Denver Area Ed. Telecommunications Consortium, Inc.*, 518 U. S., at 767. And we have concluded that today's holding is fundamentally inconsistent with the judge-based sentencing system that Congress enacted into law. In our view, it is more consistent with Congress' likely intent in enacting the Sentencing Reform Act (1) to preserve important elements of that system while severing and excising two provisions (§§ 3553(b)(1) and 3742(e)) than (2) to maintain all provisions of the Act and engraft today's constitutional requirement onto that statutory scheme.

Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.

IV

We briefly explain why we have not fully adopted the remedial proposals that the parties have advanced. First, the Government argues that "in any case in which the Constitution prohibits the judicial factfinding procedures that Congress and the Commission contemplated for implementing

the Guidelines, the Guidelines as a whole become inapplicable." Brief for United States in No. 04–104, p. 44. Thus the Guidelines "system contemplated by Congress and created by the Commission would be inapplicable in a case in which the Guidelines would require the sentencing court to find a sentence-enhancing fact." *Id.*, at 66–67. The Guidelines would remain advisory, however, for § 3553(a) would remain intact. *Ibid.* Cf. Brief for New York Council of Defense Lawyers as *Amicus Curiae* 15, n. 9 (A "decision that Section 3553(b) . . . is unconstitutional . . . would not necessarily jeopardize the other reforms made by the Sentencing Reform Act, including . . . 18 U. S. C. § 3553(a)"); see also *ibid.* (recognizing that the remainder of the Act functions independently); Brief for Families Against Mandatory Minimums as *Amicus Curiae* 29, 30.

As we understand the Government's remedial suggestion, it coincides significantly with our own. But compare *post*, at 282 (STEVENS, J., dissenting in part) (asserting that no party or *amicus* sought the remedy we adopt); *post*, at 309 (SCALIA, J., dissenting in part) (same). The Government would render the Guidelines advisory in "any case in which the Constitution prohibits" judicial factfinding. But it apparently would leave them as binding in all other cases.

We agree with the first part of the Government's suggestion. However, we do not see how it is possible to leave the Guidelines as binding in other cases. For one thing, the Government's proposal would impose mandatory Guidelines-type limits upon a judge's ability to *reduce* sentences, but it would not impose those limits upon a judge's ability to *increase* sentences. We do not believe that such "one-way lever[s]" are compatible with Congress' intent. Cf. Brief for Sen. Orrin G. Hatch et al. as *Amici Curiae* 22; see also *supra*, at 253–254. For another, we believe that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system would create.

Such a two-system proposal seems unlikely to further Congress' basic objective of promoting uniformity in sentencing.

Second, the respondents in essence would take the same approach as would JUSTICE STEVENS. They believe that the constitutional requirement is compatible with the Sentencing Act, and they ask us to hold that the Act continues to stand as written with the constitutional requirement engrafted onto it. We do not accept their position for the reasons we have already given. See Part II, *supra*.

Respondent Fanfan argues in the alternative that we should excise those provisions of the Sentencing Act that require judicial factfinding at sentencing. That system, however, would produce problems similar to those we have discussed in Part II, *supra*. We reject Fanfan's remedial suggestion for that reason.

V

In respondent Booker's case, the District Court applied the Guidelines as written and imposed a sentence higher than the maximum authorized solely by the jury's verdict. The Court of Appeals held *Blakely* applicable to the Guidelines, concluded that Booker's sentence violated the Sixth Amendment, vacated the judgment of the District Court, and remanded for resentencing. We affirm the judgment of the Court of Appeals and remand the case. On remand, the District Court should impose a sentence in accordance with today's opinions, and, if the sentence comes before the Court of Appeals for review, the Court of Appeals should apply the review standards set forth in this opinion.

In respondent Fanfan's case, the District Court held *Blakely* applicable to the Guidelines. It then imposed a sentence that was authorized by the jury's verdict—a sentence lower than the sentence authorized by the Guidelines as written. Thus, Fanfan's sentence does not violate the Sixth Amendment. Nonetheless, the Government (and the defendant should he so choose) may seek resentencing under the system set forth in today's opinions. Hence we vacate

the judgment of the District Court and remand the case for further proceedings consistent with this opinion.

As these dispositions indicate, we must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review. See *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"). See also *Reynoldsville Casket Co.* v. *Hyde*, 514 U. S. 749, 752 (1995) (civil case); *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. 86, 97 (1993) (same). That fact does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the "plain-error" test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Title 18 U. S. C. § 3553(a) (2000 ed. and Supp. IV) provides:

"Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the need for the sentence imposed—

"(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

"(B) to afford adequate deterrence to criminal conduct;

"(C) to protect the public from further crimes of the defendant; and

"(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

"(3) the kinds of sentences available;

"(4) the kinds of sentence and the sentencing range established for—

"(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

"(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

"(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

"(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

"(5) any pertinent policy statement—

"(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to

any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

"(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

"(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

"(7) the need to provide restitution to any victims of the offense."

Title 18 U. S. C. § 3553(b)(1) (Supp. IV) provides: "Application of guidelines in imposing a sentence.—(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

Title 18 U. S. C. § 3742(e) (2000 ed. and Supp. IV) provides:

"Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines;

"(3) is outside the applicable guideline range, and

"(A) the district court failed to provide the written statement of reasons required by section 3553(c);

"(B) the sentence departs from the applicable guideline range based on a factor that—

"(i) does not advance the objectives set forth in section 3553(a)(2); or

"(ii) is not authorized under section 3553(b); or

"(iii) is not justified by the facts of the case; or

"(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

"(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

"The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts."

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, and with whom JUSTICE SCALIA joins except for Part III and footnote 17, dissenting in part.

Neither of the two Court opinions that decide these cases finds any constitutional infirmity inherent in any provision of the Sentencing Reform Act of 1984 (SRA) or the Federal Sentencing Guidelines. Specifically, neither 18 U. S. C. § 3553(b)(1) (Supp. IV), which makes application of the Guidelines mandatory, nor § 3742(e) (2000 ed. and Supp. IV), which authorizes appellate review of departures from the Guidelines, is even arguably unconstitutional. Neither the Government, nor the respondents, nor any of the numerous *amici* has suggested that there is any need to invalidate either provision in order to avoid violations of the Sixth Amendment in the administration of the Guidelines. The Court's decision to do so represents a policy choice that Congress has considered and decisively rejected. While it is perfectly clear that Congress has ample power to repeal these two statutory provisions if it so desires, this Court should not make that choice on Congress' behalf. I respectfully dissent from the Court's extraordinary exercise of authority.

Before explaining why the law does not authorize the Court's creative remedy, why the reasons it advances in support of its decision are unpersuasive, and why it is abundantly clear that Congress has already rejected that very remedy, it is appropriate to explain how the violation of the Sixth Amendment that occurred in Booker's case could readily have been avoided without making any change in the Guidelines. Booker received a sentence of 360 months' imprisonment. His sentence was based on four factual determinations: (1) the jury's finding that he possessed 92.5 grams of crack (cocaine base); (2) the judge's finding that he possessed an additional 566 grams; (3) the judge's conclusion that he had obstructed justice; and (4) the judge's evaluation of his prior criminal record. Under the jury's 92.5 grams finding, the maximum sentence authorized by the Guidelines

was a term of 262 months. See United States Sentencing Commission, Guidelines Manual §2D1.1(c)(4) (Nov. 2003) (USSG).

If the 566 gram finding had been made by the jury based on proof beyond a reasonable doubt, that finding would have authorized a Guidelines sentence anywhere between 324 and 405 months—the equivalent of a range from 27 to nearly 34 years—given Booker's criminal history. §2D1.1(c)(2). Relying on his own appraisal of the defendant's obstruction of justice, and presumably any other information in the presentence report, the judge would have had discretion to select any sentence within that range. Thus, if the two facts, which in this case actually established two separate crimes, had both been found by the jury, the judicial factfinding that produced the actual sentence would not have violated the Constitution. In other words, the judge could have considered Booker's obstruction of justice, his criminal history, and all other real offense and offender factors without violating the Sixth Amendment. Because the Guidelines as written possess the virtue of combining a mandatory determination of sentencing ranges and discretionary decisions within those ranges, they allow ample latitude for judicial factfinding that does not even arguably raise any Sixth Amendment issue.

The principal basis for the Court's chosen remedy is its assumption that Congress did not contemplate that the Sixth Amendment would be violated by depriving the defendant of the right to a jury trial on a factual issue as important as whether Booker possessed the additional 566 grams of crack that exponentially increased the maximum sentence that he could receive. I am not at all sure that that assumption is correct, but even if it is, it does not provide an adequate basis for volunteering a systemwide remedy that Congress has already rejected and could enact on its own if it elected to.

When one pauses to note that over 95% of all federal criminal prosecutions are terminated by a plea bargain, and the

further fact that in almost half of the cases that go to trial there are no sentencing enhancements, the extraordinary overbreadth of the Court's unprecedented remedy is manifest. It is, moreover, unique because, under the Court's reasoning, if Congress should decide to reenact the exact text of the two provisions that the Court has chosen to invalidate, that reenactment would be unquestionably constitutional. In my judgment, it is therefore clear that the Court's creative remedy is an exercise of legislative, rather than judicial, power.

I

It is a fundamental premise of judicial review that all Acts of Congress are presumptively valid. See *Regan* v. *Time, Inc.*, 468 U. S. 641, 652 (1984). "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Ibid.* In the past, because of its respect for the coordinate branches of Government, the Court has invalidated duly enacted statutes—or particular provisions of such statutes—"only upon a plain showing that Congress has exceeded its constitutional bounds." *United States* v. *Morrison*, 529 U. S. 598, 607 (2000); see also *El Paso & Northeastern R. Co.* v. *Gutierrez*, 215 U. S. 87, 97 (1909). The exercise of such power is traditionally limited to issues presented in the case or controversy before the Court, and to the imposition of remedies that redress specific constitutional violations.

There are two narrow exceptions to this general rule. A facial challenge may succeed if a legislative scheme is unconstitutional in all or nearly all of its applications. That is certainly not true in these cases, however, because most applications of the Guidelines are unquestionably valid. A second exception involves cases in which an invalid provision or application cannot be severed from the remainder of the statute. That exception is inapplicable because there is no statutory or Guidelines provision that is invalid. Neither exception supports the majority's newly minted remedy.

Facial Invalidity:

Regardless of how the Court defines the standard for determining when a facial challenge to a statute should succeed,[1] it is abundantly clear that the fact that a statute, or any provision of a statute, is unconstitutional in a portion of its applications does not render the statute or provision invalid, and no party suggests otherwise. The Government conceded at oral argument that 45% of federal sentences involve no enhancements. Cf. United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics 39–40 (hereinafter Sourcebook).[2] And, according to two U. S. Sentencing Commissioners who testified before Congress shortly after we handed down our decision in *Blakely* v. *Washington*, 542 U. S. 296 (2004), the number of enhancements that would actually implicate a defendant's Sixth Amendment rights is even smaller. See Hearings on *Blakely* v. *Washington* and the Future of the Federal Sentencing Guidelines before the Senate Committee on the Judiciary, 108th Cong., 2d Sess., 2 (2004) (hereinafter Hearings on *Blakely*) (testimony of Commissioners John R. Steer and Hon. William K. Sessions III) ("[A] majority of the cases sentenced under the federal guidelines do not receive sentencing enhancements that could potentially implicate *Blakely*"), available at http://www.ussc.gov/hearings/BlakelyTest.pdf (all Internet materials as visited Jan. 7, 2005, and available in Clerk of Court's case file). Simply stated, the Government's

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[1] We have, on occasion, debated the proper interpretation of various precedents concerning facial challenges to statutes. Compare *Chicago* v. *Morales*, 527 U. S. 41, 54–55, n. 22 (1999) (plurality opinion), with *id.*, at 78–83 (SCALIA, J., dissenting), and *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). That debate is immaterial to my conclusion here, because it borders on the frivolous to contend that the Guidelines can be constitutionally applied "only in a fraction of the cases [they were] originally designed to cover." *United States* v. *Raines*, 362 U. S. 17, 23 (1960).

[2] See also Lodging of Government, Estimate of Number of Cases Possibly Impacted by the *Blakely* Decision, p. 2 (hereinafter Estimate).

submissions to this Court and to Congress demonstrate that the Guidelines could be constitutionally applied in their entirety, without any modifications, in the "majority of the cases sentenced under the federal guidelines." *Ibid.* On the basis of these submissions alone, this Court should have declined to find the Guidelines, or any particular provisions of the Guidelines, facially invalid.[3]

Accordingly, the majority's claim that a jury factfinding requirement would "destroy the system," *ante*, at 252 (opinion of BREYER, J.), would at most apply to a *minority* of sentences imposed under the Guidelines. In reality, given that the Government and judges have been apprised of the requirements of the Sixth Amendment, the number of unconstitutional applications would have been even smaller had we allowed them the opportunity to comply with our constitutional holding. This is so for several reasons.

First, it is axiomatic that a defendant may waive his Sixth Amendment right to trial by jury. *Patton* v. *United States*, 281 U. S. 276, 312–313 (1930). In *Blakely* we explained that "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant

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[3] See, *e. g.*, *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 524 (1989) (O'CONNOR, J., concurring in part and concurring in judgment) (arguing that a statute cannot be struck down on its face whenever the statute has "some quite straightforward applications [that] would be constitutional"); *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 977 (1984) (REHNQUIST, J., dissenting) ("When a litigant challenges the constitutionality of a statute, he challenges the statute's application to him. . . . If he prevails, the Court invalidates the statute, not *in toto*, but only as applied to those activities. The law is refined by preventing improper applications on a case-by-case basis. In the meantime, the interests underlying the law can still be served by its enforcement within constitutional bounds"); cf. *Raines*, 362 U. S., at 21 (this Court should never "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'"); *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990) (plurality opinion) (statutes should not be invalidated "on a facial challenge based upon a worst-case analysis that may never occur").

either stipulates to the relevant facts or consents to judicial factfinding." 542 U. S., at 310. Such reasoning applies with equal force to sentences imposed under the Guidelines. As the majority concedes, *ante*, at 248, only a tiny fraction of federal prosecutions ever go to trial. See Estimate, at 2 ("In FY02, 97.1 percent of cases sentenced under the guidelines were the result of plea agreements"). If such procedures were followed in the future, our holding that *Blakely* applies to the Guidelines would be consequential only in the tiny portion of prospective sentencing decisions that are made after a defendant has been found guilty by a jury.

Second, in the remaining fraction of cases that result in a jury trial, I am confident that those charged with complying with the Guidelines—judges, aided by prosecutors and defense attorneys—could adequately protect defendants' Sixth Amendment rights without this Court's extraordinary remedy. In many cases, prosecutors could avoid an *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence. Following our decision in *Apprendi*, and again after our decision in *Blakely*, the Department of Justice advised federal prosecutors to adopt practices that would enable them "to charge and prove to the jury facts that increase the statutory maximum—for example, drug type and quantity for offenses under 21 U. S. C. 841."[4] Enhancing the specificity of indictments would be a simple matter, for example, in prosecutions under the federal drug statutes (such as Booker's prosecution). The Government has already directed its prosecutors to allege facts such as the

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[4] Memorandum from Christopher A. Wray, Assistant Attorney General, U. S. Department of Justice, Criminal Division, to All Federal Prosecutors, re: Guidance Regarding the Application of *Blakely* v. *Washington* to Pending Cases, p. 8, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf (hereinafter Application of *Blakely*); see also Brief for National Association of Federal Defenders as *Amicus Curiae* 9–12.

possession of a dangerous weapon or "that the defendant was an organizer or leader of criminal activity that involved five or more participants" in the indictment and prove them to the jury beyond a reasonable doubt.[5]

Third, even in those trials in which the Guidelines require the finding of facts not alleged in the indictment, such fact-finding by a judge is not unconstitutional *per se*. To be clear, our holding in Parts I–III, *ante*, at 243–244 (STEVENS, J., opinion of the Court), that *Blakely* applies to the Guidelines does not establish the "impermissibility of judicial fact-finding." Brief for United States 46. Instead, judicial fact-finding to support an offense level determination or an enhancement is *only unconstitutional when that finding raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant.* This distinction is crucial to a proper understanding of why the Guidelines could easily function as they are currently written.

Consider, for instance, a case in which the defendant's initial sentencing range under the Guidelines is 130-to-162 months, calculated by combining a base offense level of 28 and a criminal history category of V. See USSG ch. 5, pt. A (Table). Depending upon the particular offense, the sentencing judge may use her discretion to select any sentence within this range, even if her selection relies upon factual determinations beyond the facts found by the jury. If the defendant described above also possessed a firearm, the Guidelines would direct the judge to apply a two-level enhancement under § 2D1.1, which would raise the defendant's total offense level from 28 to 30. That, in turn, would raise the defendant's eligible sentencing range to 151-to-188 months. That act of judicial factfinding would comply with the Guidelines and the Sixth Amendment so long as the sen-

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[5] See Application of *Blakely* 9.

tencing judge then selected a sentence between 151-to-162 months—the lower number (151) being the bottom of offense level 30 and the higher number (162) being the maximum sentence under level 28, which is the upper limit of the range supported by the jury findings alone. This type of overlap between sentencing ranges is the rule, not the exception, in the Guidelines as currently constituted. See 1 Practice Under the Federal Sentencing Guidelines § 6.01[B], p. 7 (P. Bamberger & D. Gottlieb eds. 4th ed. 2003 Supp.) (noting that nearly all Guidelines ranges overlap and that "because of the overlap, the actual sentence imposed can theoretically be the same no matter which guideline range is chosen"). Trial courts have developed considerable expertise in employing overlapping provisions in such a manner as to avoid unnecessary resolution of factual disputes, see § 7.03[B][2], at 34 (2004 Supp.), and lower courts have shown themselves capable of distinguishing proper from improper applications of sentencing enhancements under *Blakely*, see, *e. g.*, *United States* v. *Mayfield*, 386 F. 3d 1301 (CA9 2004) (upholding a two-level enhancement for firearm possession from offense level 34 to 36 because the sentencing judge selected a sentence within the overlapping range between the two levels). The interaction of these various Guidelines provisions demonstrates the fallacy in the assumption that judicial fact-finding can never be constitutional under the Guidelines.

The majority's answer to the fact that the vast majority of applications of the Guidelines are constitutional is that "we must determine likely intent not by counting proceedings, but by evaluating the consequences of the Court's constitutional requirement" on every imaginable case. *Ante*, at 248 (opinion of BREYER, J.). That approach ignores the lessons of our facial invalidity cases. Those cases stress that this Court is ill suited to the task of drafting legislation and that, therefore, as a matter of respect for coordinate branches of

Government, we ought to presume whenever possible that those charged with writing and implementing legislation will and can apply "the statute consistently with the constitutional command." *Time, Inc.* v. *Hill*, 385 U. S. 374, 397 (1967). Indeed, this Court has generally refused to consider "every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," *Barrows* v. *Jackson*, 346 U. S. 249, 256 (1953), because "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined," *United States* v. *Raines*, 362 U. S. 17, 22 (1960). The Government has already shown it can apply the Guidelines constitutionally even as written, and Congress is perfectly capable of redrafting the statute on its own. Thus, there is no justification for the extreme judicial remedy of total invalidation of any part of the SRA or the Guidelines.

In sum, it is indisputable that the vast majority of federal sentences under the Guidelines would have complied with the Sixth Amendment without the Court's extraordinary remedy. Under any reasonable reading of our precedents, in no way can it be said that the Guidelines are, or that any particular Guidelines provision is, facially unconstitutional.

Severability:

Even though a statute is not facially invalid, a holding that certain specific provisions are unconstitutional may make it necessary to invalidate the entire statute. See generally Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76 (1937) (hereinafter Stern). Our normal rule, however, is that the "unconstitutionality of a *part* of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted *those provisions* which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative

as a law." *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932) (emphasis added).[6]

Our "severability" precedents, however, cannot support the Court's remedy because there is no provision of the SRA or the Guidelines that falls outside of Congress' power. See *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987). Accordingly, severability analysis simply does not apply.

The majority concludes that our constitutional holding requires the invalidation of §§ 3553(b)(1) and 3742(e). The first

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[6] There is a line of cases that some commentators have described as standing for the proposition that the Court must engage in severability analysis if a statute is unconstitutional in only some of its applications. See Stern 82. However, these cases simply hold that a statute that may apply both to situations within the scope of Congress' enumerated powers and also to situations that exceed such powers, the Court will sustain the statute only if it can be validly limited to the former situations, and will strike it down if it cannot be so limited. Compare *United States* v. *Reese*, 92 U. S. 214, 221 (1876) (invalidating in its entirety statute that punished individuals who interfered with the right to vote, when the statute applied to conduct that violated the Fifteenth Amendment and conduct outside that constitutional prohibition), and *Trade-Mark Cases*, 100 U. S. 82, 98 (1879) (concluding that the Trade-Mark Act must be read to "establish a universal system of trade-mark registration" and thus was invalid in its entirety because it exceeded the bounds of the Commerce Clause), with *The Abby Dodge*, 223 U. S. 166, 175 (1912) (construing language to apply only to waters not within the jurisdiction of the States, and therefore entirely valid), and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30–31 (1937) (holding that the National Labor Relations Act applied only to interstate commerce, and upholding its constitutionality on that basis). These cases are thus about constitutional avoidance, not severability.

In a separate dissent, JUSTICE THOMAS relies on this principle to conclude that the proper analysis is whether the unconstitutional applications of the Guidelines are sufficiently numerous and integral to warrant invalidating the Guidelines in their entirety. See *post*, at 323. While I understand the intuitive appeal of JUSTICE THOMAS' dissent, I do not believe that our cases support this approach. In any event, given the vast number of constitutional applications, see *supra*, at 276, it is clear that Congress would, as JUSTICE THOMAS concludes, prefer that the Guidelines not be invalidated. I therefore do not believe that any extension of our severability cases is warranted.

of these sections uses the word "shall" to make the substantive provisions of the Guidelines mandatory. See *Mistretta* v. *United States*, 488 U. S. 361, 367 (1989). The second authorizes *de novo* review of sentencing judges' applications of relevant Guidelines provisions. Neither section is unconstitutional. While these provisions can in certain cases, when combined with other statutory and Guidelines provisions, result in a violation of the Sixth Amendment, they are plainly constitutional on their faces.

Rather than rely on traditional principles of facial invalidity or severability, the majority creates a new category of cases in which this Court may invalidate any part or parts of a statute (and add others) when it concludes that Congress would have preferred a modified system to administering the statute in compliance with the Constitution. This is entirely new law. Usually the Court first declares unconstitutional a particular provision of law, and only then does it inquire whether the remainder of the statute can be saved. See, *e. g.*, *Regan* v. *Time*, 468 U. S., at 652; *Alaska Airlines*, 480 U. S., at 684. Review in this manner *limits* judicial power by *minimizing* the damage done to the statute by judicial fiat. There is no case of which I am aware, however, in which this Court has used "severability" analysis to do what the majority does today: determine that *some* unconstitutional applications of a statute, when viewed in light of the Court's reading of "likely" legislative intent, justifies the invalidation of certain statutory sections in their entirety, their constitutionality notwithstanding, in order to save the parts of the statute the Court deemed most important. The novelty of this remedial maneuver perhaps explains why *no party* or *amicus curiae* to this litigation has requested the remedy the Court now orders. In addition, none of the federal courts that have addressed *Blakely*'s application to the Guidelines has concluded that striking down § 3553(b)(1) is a proper solution.

Most importantly, the Court simply has no authority to invalidate legislation absent a showing that it is unconstitutional. To paraphrase Chief Justice Marshall, an "act of the legislature" must be "repugnant to the constitution" in order to be void. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). When a provision of a statute is unconstitutional, that provision is void, and the Judiciary is therefore not bound by it in a particular case. Here, however, the provisions the majority has excised from the statute are perfectly valid: Congress could pass the identical statute tomorrow and it would be binding on this Court so long as it were administered in compliance with the Sixth Amendment.[7] Because the statute itself is not repugnant to the Constitution and can by its terms comport with the Sixth Amendment, the Court does not have the constitutional authority to invalidate it.

The precedent on which the Court relies is scant indeed. It can only point to cases in which a provision of law was unconstitutionally extended to or limited to a particular class; in such cases it is necessary either to invalidate the provision or to require the legislature to extend the benefit to an excluded class.[8] Given the sweeping nature of the

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[7] The predicate for the Court's remedy is its assumption that Congress would not have enacted mandatory Guidelines if it had realized that the Sixth Amendment would require some enhancements to be supported by jury factfinding. If Congress should reenact the statute following our decision today, it would repudiate that premise. That is why I find the Court's professed disagreement with this proposition unpersuasive. See *ante*, at 250 (opinion of BREYER, J.). Surely Congress could reenact the identical substantive provisions if the reenactment included a clarifying provision stating that the word "court" shall not be construed to prohibit a judge from requiring jury factfinding when necessary to comply with the Sixth Amendment. Indeed, because in my view such a construction of the word "court" is appropriate in any event, see *infra*, at 286–287, there would be no need to include the clarifying provision to save the statute.

[8] In *Sloan* v. *Lemon*, 413 U. S. 825 (1973), the Court concluded that legislation reimbursing parents for tuition paid to private schools ran afoul of the Establishment Clause and struck down the law in its entirety, even as applied to parents of students in secular schools. The Court did not, as

remedy ordained today, the majority's assertions that it is proper to engage in an *ex ante* analysis of congressional intent in order to select in the first instance the statutory provisions to be struck down is contrary to the very purpose of engaging in severability analysis—the Court's remedy expands, rather than limits, judicial power.

There is no justification for extending our severability cases to cover this situation. The SRA and the Guidelines can be read—and are being currently read—in a way that complies with the Sixth Amendment. If Congress wished to amend the statute to enact the majority's vision of how the Guidelines should operate, it would be perfectly free to do so. There is no need to devise a novel and questionable method of invalidating statutory provisions that can be constitutionally applied.

II

Rather than engage in a wholesale rewriting of the SRA, I would simply allow the Government to continue doing what it has done since this Court handed down *Blakely*—prove any fact that is *required* to increase a defendant's sentence

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the majority would have us do, strike down particular parts of the statute. In *Welsh* v. *United States*, 398 U. S. 333, 361–363 (1970), Justice Harlan, writing alone, concluded that a statutory provision that allowed conscientious objectors to be exempt from military service only if their views were religiously based violated the Establishment Clause. He then concluded that, rather than deny the exception to religiously based objectors, it should be extended to moral objectors, in large part because "the broad discretion conferred by a severability clause" was not present in the case. *Id.*, at 365. Finally, in *Heckler* v. *Mathews*, 465 U. S. 728, 739, n. 6 (1984), the Court stated the obvious rule that when a statute provides a benefit to one protected class and not the other, the Court is faced with the choice of requiring the Legislature to extend the benefits, or nullifying the benefits altogether. None of these cases stands for the sweeping proposition that where parts of a statute are invalid in certain applications, the Court may opine as to whether Congress would prefer facial invalidation of some, but not all, of the provisions necessary to the constitutional violation.

under the Guidelines to a jury beyond a reasonable doubt. As I have already discussed, a requirement of jury factfinding for certain issues can be implemented without difficulty in the vast majority of cases. See *supra*, at 276–280.

Indeed, this already appears to be the case. "[T]he Department of Justice already has instituted procedures which would protect the overwhelming majority of future cases from *Blakely* infirmity. The Department of Justice has issued detailed guidance for every stage of the prosecution from indictment to final sentencing, including alleging facts that would support sentencing enhancements and requiring defendants to waive any potential *Blakely* rights in plea agreements." Hearings on *Blakely* 1–2.[9] Given this experience, I think the Court dramatically overstates the difficulty of implementing this solution.

The majority advances five reasons why the remedy that is already in place will not work. First, the majority points to the statutory text referring to "the court" in arguing that jury factfinding is impermissible. While this text is no doubt evidence that Congress *contemplated* judicial factfinding, it does not demonstrate that Congress thought that judicial factfinding was so essential that, if forced to choose between a system including jury determinations of certain facts in certain cases on the one hand, and a system in which the Guidelines would cease to restrain the discretion of federal judges on the other, Congress would have selected the latter.

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[9] The Commissioners went on to note that, "[e]ven if *Blakely* is found to apply to the federal guidelines, the waters are not as choppy as some would make them out to be. The viability of the [Guidelines] previously was called into question by some after [*Apprendi* v. *New Jersey*, 530 U. S. 466 (2000)]. After an initial period of uncertainty, however, the circuit courts issued opinions and the Department of Justice instituted procedures to ensure that future cases complied with *Apprendi*'s requirements and also left the guidelines system intact." Hearings on *Blakely* 1.

As a textual matter, the word "court" can certainly be read to include a judge's selection of a sentence as supported by a jury verdict—this reading is plausible either as a pure matter of statutory construction or under principles of constitutional avoidance. Ordinarily, "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones* v. *United States*, 526 U. S. 227, 239 (1999) (quoting *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909)). This principle, which "has for so long been applied by this Court that it is beyond debate," *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988), is intended to show respect for Congress by presuming it "legislates in the light of constitutional limitations," *Rust* v. *Sullivan*, 500 U. S. 173, 191 (1991).

The Court, however, reverses the ordinary presumption. It interprets the phrase "[t]he court . . . shall consider" in 18 U. S. C. §3553(a) (Supp. IV) to mean: The judge shall consider and impose the appropriate sentence, but the judge shall not be constrained by any findings of a jury. See *ante*, at 249 (opinion of BREYER, J.) (interpreting the word "court" to mean "'the judge without the jury'"). The Court's narrow reading of the statutory text is unnecessary. Even assuming that the word "court" should be read to mean "judge, and only the judge," a requirement that certain enhancements be supported by jury verdicts leaves the ultimate sentencing decision exclusively within the judge's hands—the judge, and the judge alone, would retain the discretion to sentence the defendant anywhere within the required Guidelines range and within overlapping Guidelines ranges when applicable. See *supra*, at 278–279. The judge would, no doubt, be limited by the findings of the jury in *certain cases*, but the fact that such a limitation would be required by the Sixth Amendment in those limited circumstances is not

a reason to adopt such a constrained view of an Act of Congress.[10]

In adopting its constrictive reading of "court," the majority has manufactured a broader constitutional problem than is necessary, and has thereby made necessary the extraordinary remedy it has chosen. I pause, however, to stress that it is not this Court's holding that the Guidelines must be applied consistently with the Sixth Amendment that has made the majority's remedy necessary. Rather, it is the Court's miserly reading of the statutory language that results in "constitutional infirmities." See *ante*, at 254 (opinion of BREYER, J.)

Second, the Court argues that simply applying *Blakely* to the Guidelines would make "real conduct" sentencing more difficult. While that is perhaps true in some cases, judges could always consider relevant conduct obtained from a presentence report pursuant to 18 U. S. C. §3661 and USSG §6A1.1 in selecting a sentence within a Guidelines range, and of course would be free to consider any such circumstances in cases in which the defendant pleads guilty and waives his *Blakely* rights. Further, in many cases the Government could simply prove additional facts to a jury beyond a reasonable doubt—as it has been doing in some cases since *Apprendi*—or the court could use bifurcated proceedings in which the relevant conduct is proved to a jury after it has convicted the defendant of the underlying crime.

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[10] This argument finds support in the Government's successful adaptation to our decision in *Apprendi*. After that decision, prosecutors began to allege more and more "sentencing factors" in indictments. See *supra*, at 277. The Government's ability to do so suggests that the Guidelines are far more compatible with "jury factfinding" than the Court admits. And, the fact that Congress is presumably aware of the Government's practices in light of *Apprendi*, yet has not condemned the practices or taken any actions to reform them, indicates that limited jury factfinding is, contrary to the majority's assertion, compatible with legislative intent. See *ante*, at 250 (opinion of BREYER, J.).

The majority is correct, however, that my preferred holding would undoubtedly affect "real conduct" sentencing in certain cases. This is so because the goal of such sentencing—increasing a defendant's sentence on the basis of conduct not proved at trial—is contrary to the very core of *Apprendi*. That certain applications of "relevant conduct" sentencing are unconstitutional should not come as a complete surprise to Congress: The House Report recognized that "real offense" sentencing could pose constitutional difficulties. H. R. Rep. No. 98–1017, p. 98 (1984). In reality, the majority's concerns about relevant conduct are nothing more than an objection to *Apprendi* itself, an objection that this Court rejected in Parts I–III, *ante* (opinion of STEVENS, J.).

Further, the Court does not explain how its proposed remedy will ensure that judges take real conduct into account. While judges certainly may do so in their discretion under § 3553(a), there is no indication as to how much or to what extent "relevant conduct" should matter under the majority's regime. Nor is there any meaningful standard by which appellate courts may review a sentencing judge's "relevant conduct" determination—only a general "reasonableness" inquiry that may discourage sentencing judges from considering such conduct altogether. The Court's holding thus may do just as much damage to real conduct sentencing as would simply requiring the Government to follow the Guidelines consistent with the Sixth Amendment.

Third, the majority argues that my remedy would make sentencing proceedings far too complex. But of the very small number of cases in which a Guidelines sentence would implicate the Sixth Amendment, see *supra*, at 275–276, most involve drug quantity determinations, firearm enhancements, and other factual findings that can readily be made by juries. I am not blind to the fact that some cases, such as fraud prosecutions, would pose new problems for prosecutors and trial judges. See *ante*, at 252–253 (opinion of BREYER, J.). In such cases, I am confident that federal trial

judges, assisted by capable prosecutors and defense attorneys, could have devised appropriate procedures to impose the sentences the Guidelines envision in a manner that is consistent with the Sixth Amendment. We have always trusted juries to sort through complex facts in various areas of law. This may not be the most efficient system imaginable, but the Constitution does not permit efficiency to be our primary concern. See *Blakely* v. *Washington*, 542 U. S., at 312–313.

Fourth, the majority assails my reliance on plea bargaining. The Court claims that I cannot discount the effect that applying *Blakely* to the Guidelines would have on plea-bargained cases, since the specter of *Blakely* will affect those cases. However, the majority's decision suffers from the same problem to a much greater degree. Prior to the Court's decision to strike the mandatory feature of the Guidelines, prosecutors and defendants alike could bargain from a position of reasonable confidence with respect to the sentencing range into which a defendant would likely fall. The majority, however, has eliminated the certainty of expectations in the plea process. And, unlike my proposed remedy, which would potentially affect only a fraction of plea bargains, the uncertainty resulting from the Court's regime change will infect the entire universe of guilty pleas which occur in 97% of all federal prosecutions.

The majority also argues that applying *Blakely* to the Guidelines would allow prosecutors to exercise "a power the Sentencing Act vested in judges," *ante*, at 257 (opinion of BREYER, J.), by giving prosecutors the choice whether to "charge" a particular fact. Under the remedy I favor, however, judges would still be able to reject factually false plea agreements under USSG §6B1.2(a), and could still consider relevant information about the offense and the offender in every single case. Judges could consider such characteristics as an aid in selecting the appropriate sentence within the Guidelines range authorized by the jury verdict, determining the defendant's criminal history level, reducing a de-

fendant's sentence, or justifying discretionary departures from the applicable Guidelines range. The Court is therefore incorrect when it suggests that requiring a supporting jury verdict for certain enhancements in certain cases would place certain sentencing factors "beyond the reach of the judge entirely." See *ante*, at 257 (opinion of BREYER, J.).

Moreover, the premise on which the Court's argument is based—that the Guidelines as currently written prevent fact bargaining and therefore diminish prosecutorial power—is probably not correct. As one commentator has noted:

> "[P]rosecutors exercise nearly as much control when guidelines tie sentences to so-called 'real-offense' factors . . . . One might reasonably assume those factors are outside of prosecutors' control, but experience with the Federal Sentencing Guidelines suggests otherwise; when necessary, the litigants simply bargain about what facts will (and won't) form the basis for sentencing. It seems to be an iron rule: guidelines sentencing empowers prosecutors, even where the guidelines' authors try to fight that tendency." Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L. Rev. 2548, 2559–2560 (2004) (footnote omitted).

Not only is fact bargaining quite common under the current system, it is also clear that prosecutors have substantial bargaining power.[11] And surely, contrary to the Court's re-

[11] See M. Johnson & S. Gilbert, The U. S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey 7–9 (1997) (noting that among federal judges and probation officers, there is widespread "frustration with the power and discretion held by prosecutors under the guidelines" and that "guidelines are manipulated through plea agreements"); Saris, Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective, 30 Suffolk U. L. Rev. 1027, 1030 (1997); see also Nagel & Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 501, 560 (1992) (arguing that fact bargaining is common under the Guidelines and has resulted in substantial sentencing disparities).

sponse to this dissent, *ante*, at 256–257 (opinion of BREYER, J.), a prosecutor who need only prove an enhancing fact by a preponderance of the evidence has more bargaining power than if required to prove the same fact beyond a reasonable doubt.

Finally, the majority argues that my solution would require a different burden of proof for enhancements above the maximum authorized by the jury verdict and for reductions. This is true because the requirement that guilt be established by proof beyond a reasonable doubt is a constitutional mandate. However, given the relatively few reductions available in the Guidelines and the availability of judicial discretion within the applicable range, this is unlikely to have more than a minimal effect.

In sum, I find unpersuasive the Court's objections to allowing Congress to decide in the first instance whether the Guidelines should be converted from a mandatory into a discretionary system. Far more important than those objections is the overwhelming evidence that Congress has already considered, and unequivocally rejected, the regime that the Court endorses today.

III

Even under the Court's innovative approach to severability analysis when confronted with unconstitutional applications of a statute, its opinion is unpersuasive. It assumes that this Court's only inquiry is to "decide whether we would deviate less radically from Congress' intended system (1) by superimposing the constitutional requirement announced today or (2) through elimination of some provisions of the statute." *Ante*, at 247 (opinion of BREYER, J.). I will assume, consistently with the majority, that in this exercise we should never use our "remedial powers to circumvent the intent of the legislature," *Califano* v. *Westcott*, 443 U. S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part), and that we must not create "a program quite different

from the one the legislature actually adopted," *Sloan* v. *Lemon*, 413 U. S. 825, 834 (1973).

In the context of this framework, in order to justify "excising" 18 U. S. C. §§ 3553(b)(1) (Supp. IV) and 3742(e) (2000 ed. and Supp. IV), the Court has the burden of showing that Congress would have preferred the remaining system of discretionary Sentencing Guidelines to not just the remedy I would favor, but also to *any* available alternative, including the alternative of total invalidation, which would give Congress a clean slate on which to write an entirely new law. The Court cannot meet this burden because Congress has already considered and overwhelmingly rejected the system it enacts today. In doing so, Congress revealed both an unmistakable preference for the certainty of a binding regime and a deep suspicion of judges' ability to reduce disparities in federal sentencing. A brief examination of the SRA's history reveals the gross impropriety of the remedy the Court has selected.

History of Sentence Reform Efforts:

In the mid-1970's, Congress began to study the numerous problems attendant to indeterminate sentencing in the federal criminal justice system. After nearly a decade of review, Congress in 1984 decided that the system needed a comprehensive overhaul. The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim. See Feinberg, Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission, 28 Wake Forest L. Rev. 291, 295–296 (1993) ("The first and foremost goal of the sentencing reform effort was to alleviate the perceived problem of federal criminal sentencing disparity. . . . Quite frankly, all other considerations were secondary"); see also Breyer, Federal Sentencing Guidelines Revisited, 2 Fed. Sentencing Rptr. 180 (1999) ("In seeking 'greater fairness,' Congress, acting in bipartisan

fashion, intended to respond to complaints of unreasonable disparity in sentencing—that is, complaints that differences among sentences reflected *not simply* different offense conduct or different offender history, but the fact that *different judges* imposed the sentences" (emphasis added)). As Senator Hatch, a central participant in the reform effort, has explained: "The discretion that Congress had conferred for so long upon the judiciary and the parole authorities was *at the heart of sentencing disparity.*" The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 Wake Forest L. Rev. 185, 187 (1993) (hereinafter Hatch) (emphasis added).

Consequently, Congress explicitly rejected as a model for reform the various proposals for advisory guidelines that had been introduced in past Congresses. One example of such legislation was the bill introduced in 1977 by Senators Kennedy and McClellan, S. 1437, 95th Cong., 1st Sess. (as reported by the Senate Judiciary Committee on Nov. 15, 1977) (hereinafter S. 1437), which allowed judges to impose sentences based on the characteristics of the individual defendant and granted judges substantial discretion to depart from recommended guidelines sentences. See Stith & Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L. Rev. 223, 238 (1993) (hereinafter Stith & Koh). That bill never became law and was refined several times between 1977 and 1984: Each of those refinements made the regime more, not less, restrictive on trial judges' discretion in sentencing.[12]

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[12] Incidentally, the original version of S. 1437 looked much like the regime that the Court has mandated today—it directed the sentencing judge to consider a variety of factors, only one of which was the sentencing range established by the Guidelines, and subjected the ultimately chosen sentence to appellate review under a "clearly unreasonable" standard. See S. 1437, § 101 (proposed 18 U. S. C. §§ 2003(a), 3725(e)). That law was

Passage of the Sentencing Reform Act of 1984:

Congress' preference for binding guidelines was evident in the debate over passage of the SRA itself, which was predicated entirely on the move from a discretionary guidelines system to the mandatory system the Court strikes down today. The SRA was the product of competing versions of sentencing reform legislation: the House bill, H. R. 6012, 98th Cong., 2d Sess., authorized the creation of discretionary guidelines whereas the Senate bill, S. 668, 98th Cong., 2d Sess., provided for binding guidelines and *de novo* appellate review. The House was splintered regarding whether to make the Guidelines binding on judges, but the vote in the Senate was an overwhelming 85 to 3 in favor of binding Guidelines. 130 Cong. Rec. 1649 (1984); see generally Stith & Koh 261–266. Eventually, the House substituted the Senate version for H. R. 6012, and the current system of mandatory Guidelines became law. 130 Cong. Rec. 29730 (1984).

The text of the law that actually passed Congress (including §§ 3553(b)(1) and 3742(e)) should be more than sufficient to demonstrate Congress' unmistakable commitment to a binding Guidelines system. That text *requires* the sentencing judge to impose the sentence dictated by the Guidelines ("[T]he court shall impose a sentence of the kind, and within the range" provided in the Guidelines unless there is a circumstance "not adequately taken into consideration by the"

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amended twice before it passed, the first time to include a mandatory directive to trial judges to impose a sentence within the Guidelines range, and the second time to change the standard of review from "'clearly unreasonable'" to "'unreasonable.'" See Stith & Koh 245 (detailing amendments to S. 1437 prior to passage). It is worth noting that Congress had countless opportunities over the course of seven years of debate to enact the law the Court creates today. Congress' repeated rejection of proposed legislation constitutes powerful evidence that Congress did not want it to become law.

Guidelines), and § 3742(e) gives § 3553(b)(1) teeth by instructing judges that any sentence outside of the Guidelines range without adequate explanation will be overturned on appeal.[13] Congress' chosen regime was carefully designed to produce uniform compliance with the Guidelines. Congress surely would not have taken the pains to create such a regime had it found the Court's system of discretionary guidelines acceptable *in any way*.

The accompanying Senate Report and floor debate make plain what should be obvious from the structure of the statute: Congress refused to accept the discretionary system that the Court implausibly deems most consistent with congressional intent.[14] In other words, given the choice between the statute created by the Court today or a clean slate

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[13] See *id.*, at 269–270; see also Wilkins, Newton, & Steer, Competing Sentencing Policies in a "War on Drugs" Era, 28 Wake Forest L. Rev. 305, 313 (1993) (same).

[14] See, *e. g.*, 133 Cong. Rec. 33109 (1987) (remarks of Sen. Hatch) ("[T]he core function of the guidelines and the underlying statute . . . is to reduce disparity in sentencing and restore fairness and predictability to the sentencing process. Adherence to the guidelines is therefore properly required under the law except in . . . rare and particularly unusual instances . . . "); *id.*, at 33110 (remarks of Sen. Biden) ("That notion of allowing the courts to, in effect, second-guess the wisdom of any sentencing guideline is plainly contrary to the act's purpose of having a sentencing guidelines system that is mandatory, except when the court finds a circumstance meeting the standard articulated in § 3553(b). It is also contrary to the purpose of having Congress, rather than the courts, review the sentencing guidelines for the appropriateness of authorized levels of punishment"); S. Rep. No. 98–223, p. 76 (1983) (noting that the Senate Judiciary Committee "resisted [the] attempt to make the sentencing guidelines more voluntary than mandatory, because of the poor record of States reported in the National Academy of Science Report which have experimented with 'voluntary' guidelines"); *id.*, at 34–35 (citing the "urgent need for" sentencing reform because of sentencing disparities caused "directly [by] the unfettered discretion the law confers on [sentencing] judges and parole authorities responsible for imposing and implementing the sentence"); *id.*, at 36–43, 62 (cataloging the "astounding" variations in federal sentencing and criticizing the unfairness of sentencing disparities).

on which to write a wholly different law, Congress undoubtedly would have selected the latter.

Congress' Method of Reducing Disparities:

The notion that Congress had any confidence that *judges* would reduce sentencing disparities by considering relevant conduct—an idea that is championed by the Court, *ante*, at 253–254 (opinion of BREYER, J.)—either ignores or misreads the political environment in which the SRA passed. It is true that the SRA instructs sentencing judges to consider real offense and offender characteristics, 28 U. S. C. A. § 994 (2000 ed. and Supp. IV), but Congress only wanted judges to consider those characteristics within the limits of a mandatory system.[15] The Senate Report on which the Court relies, see *ante*, at 249–250, clearly concluded that the existence of sentencing disparities "can be traced directly to the unfettered discretion the law confers on those judges . . . responsible for imposing and implementing the sentence." S. Rep. No. 98–225, p. 38 (1983). Even in a system in which judges could not impose sentences based on "relevant con-

[15] Indeed, the Court's contention that real conduct sentencing was the principal aim of the SRA finds no support in the legislative history. The only authority the Court cites is 18 U. S. C. § 3661, which permits a judge to consider any information she considers relevant to sentencing. See *ante*, at 249–250 (opinion of BREYER, J.). That provision, however, was enacted in 1970, see Pub. L. 91–452, § 1001(a), 84 Stat. 951 (there numbered § 3577), and thus provides *no evidence whatsoever* of Congress' intent when it passed the SRA in 1984. Clearly, Congress thought that real conduct sentencing could not effectively address sentencing disparities without a binding Guidelines regime. For this reason, traditional sentencing goals have always played a minor role in the Guidelines system: "While the thick-as-your-wrist Guideline Manual specifically directs sentencing judges to make thousands of determinations on discrete points, not *once* does it expressly direct that a specific decision leading to the applicable guideline range on the 256-box grid should or must turn on an individualized consideration of the traditional goals of sentencing." Osler, Uniformity and Traditional Sentencing Goals in the Age of Feeney, 16 Fed. Sentencing Rptr. 253, 253–254 (2004).

duct" determinations (absent a plea agreement or supporting jury findings), sentences would still be every bit as certain and uniform as in the status quo—at most, the process for imposing those sentences would be more complex. The same can hardly be said of the Court's chosen system, in which *all* federal sentencing judges, in *all* cases, regain the unconstrained discretion Congress eliminated in 1984.

The Court's conclusion that Congress envisioned a sentencing judge as the centerpiece of its effort to reduce disparities is remarkable given the context of the broader legislative debate about what entity would be responsible for drafting the Guidelines under the SRA. The House version of the bill preferred the Guidelines to be written by the Judicial Conference of the United States—the House Report accompanying that bill argued that judges had vast experience in sentencing and would best be able to craft a system capable of providing sentences based on real conduct without excessive disparity. See H. R. Rep. No. 98–1017, at 93–94. Those in the Senate majority, however, favored an independent Commission. They did so, whether rightly or wrongly, based on a belief that federal judges could not be trusted to impose fair and uniform sentences. See, *e. g.*, 130 Cong. Rec. 976 (1984) (remarks of Sen. Laxalt) ("The present problem with disparity in sentencing . . . stems precisely from the failure of [f]ederal judges—individually and collectively—to sentence similarly situated defendants in a consistent, reasonable manner. There is little reason to believe that judges will now begin to do what they have failed to do in the past"). And, at the end of the debate, the few remaining Members in the minority recognized that the battle to empower judges with more discretion had been lost. See, *e. g.*, *id.*, at 973 (remarks of Sen. Mathias) (arguing that "[t]he proponents of the bill . . . argue in essence that judges cannot be trusted. You cannot trust a judge . . . you must not trust a judge"). I find it impossible to believe that a Congress in which these

sentiments prevailed would have ever approved of the discretionary sentencing regime the Court enacts today.

Congressional Activity Since 1984:

Congress has not wavered in its commitment to a binding system of Sentencing Guidelines. In fact, Congress has rejected each and every attempt to loosen the rigidity of the Guidelines or vest judges with more sentencing options. See Hatch 189 ("In ensuing years, Congress would maintain its adherence to the concept of binding guidelines by consistently rejecting efforts to make the guidelines more discretionary"). Most recently, Congress' passage of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108–21, 117 Stat. 650, reinforced the mandatory nature of the Guidelines by expanding *de novo* review of sentences to include all departures from the Guidelines and by directing the Commission to limit the number of available departures. The majority admits that its holding has made the PROTECT Act irrelevant. See *ante*, at 261 (opinion of BREYER, J.) (admitting that after the Court's remedy, the PROTECT Act's provisions "have ceased to be relevant"). Even a cursory reading of the legislative history of the PROTECT Act reveals the absurdity of the claim that Congress would find acceptable, under any circumstances, the Court's restoration of judicial discretion through the facial invalidation of §§3553(b)(1) and 3742(e).[16] In sum, despite Congress' un-

[16] Although there was no accompanying committee report attached to the PROTECT Act, the floor debates over the PROTECT Act's relevant provisions belie the majority's contention that a discretionary Guidelines system is more consistent with Congress' intent than the holding I would adopt. See 149 Cong. Rec. 9345, 9353–9354 (2003) (remarks of Sen. Hatch) (arguing that the PROTECT Act "says the game is over for judges: You will have some departure guidelines from the Sentencing Commission, but you are not going to go beyond those, and you are not going to go on doing what is happening in our society today on children's crimes, no matter how softhearted you are. That is what we are trying

equivocal demand that the Guidelines operate as a binding system, and in the name of avoiding any reduction in the power of the sentencing judge vis-à-vis the jury (a subject to which Congress did not speak), the majority has erased the heart of the SRA and ignored in their entirety all of the Legislative Branch's postenactment expressions of how the Guidelines are supposed to operate.

The majority's answer to this overwhelming history is that retaining a mandatory Guidelines system "is not a choice that remains open" given our holding that *Blakely* applies to the Guidelines. *Ante*, at 265. This argument—essentially, that the *Apprendi* rule makes determinate sentencing unconstitutional—has been advanced repeatedly since *Apprendi*. See, *e. g.*, 530 U. S., at 549–554 (O'CONNOR, J., dissenting); *Blakely*, 542 U. S., at 314 (O'CONNOR, J., dissenting); *id.*, at 345–346 (BREYER, J., dissenting). These prophecies were self-fulfilling. It is not *Apprendi* that has brought an end to determinate sentencing. This Court clearly had the power to adopt a remedy that both complied with the Sixth Amendment and also preserved a determinate sentencing regime in which judges make regular factual determinations regarding a defendant's sentence. It has chosen instead to exaggerate the constitutional problem and to expand the scope of judicial invalidation far beyond that which is even arguably necessary. Our holding that *Blakely* applies to the Sentencing Guidelines did not dictate the Court's unprecedented remedy.

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to do here. . . . We say in this bill: We are sick of this, judges. You are not going to do this anymore except within the guidelines set by the Sentencing Commission"); *id.*, at 9354 ("[T]rial judges systematically undermine the sentencing guidelines by creating new reasons to reduce these sentences"); *id.*, at 12357 (2003) (remarks of Sen. Kennedy) ("The Feeney Amendment effectively strips Federal judges of discretion to impose individualized sentences, and transforms the longstanding sentencing guidelines system into a mandatory minimum sentencing system. It limits in several ways the ability of judges to depart downwards from the guidelines").

IV

As a matter of policy, the differences between the regime enacted by Congress and the system the Court has chosen are stark. Were there any doubts about whether Congress would have preferred the majority's solution, these are sufficient to dispel them. First, Congress' stated goal of uniformity is eliminated by the majority's remedy. True, judges must still *consider* the sentencing range contained in the Guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U. S. C. § 3553(a) (2000 ed. and Supp. IV). The result is certain to be a return to the same type of sentencing disparities Congress sought to eliminate in 1984. Prior to the PROTECT Act, rates of departure from the applicable Guidelines sentence (via upward or downward departure) varied considerably depending upon the Circuit in which one was sentenced. See Sourcebook 53–55 (Table 26) (showing that 76.6% of sentences in the Fourth Circuit were within the applicable Guidelines range, whereas only 48.8% of sentences in the Ninth Circuit fell within the range). Those disparities will undoubtedly increase in a discretionary system in which the Guidelines are but one factor a judge must consider in sentencing a defendant within a broad statutory range.

Moreover, the Court has neglected to provide a critical procedural protection that existed prior to the enactment of a binding Guidelines system. Before the SRA, the sentencing judge had the discretion to impose a sentence that designated a minimum term "at the expiration of which the prisoner shall become eligible for parole." 18 U. S. C. § 4205(b) (1982 ed.) (repealed by Pub. L. 98–473, § 218(a)(5), 98 Stat. 2027). Sentencing judges had the discretion to reduce a minimum term of imprisonment upon the recommendation of the Bureau of Prisons. § 4205(g). Through these provi-

sions and others, see generally §§ 4201–4215, all of which were effectively repealed in 1984, it was the Parole Commission—not the sentencing judge—who was ultimately responsible for determining the length of each defendant's real sentence. See, *e. g.*, S. Rep. No. 98–225, at 38. Prior to the Guidelines regime, the Parole Commission was designed to reduce sentencing disparities and to provide a check for defendants who had received excessive sentences. Today, the Court reenacts the discretionary Guidelines system that once existed without providing this crucial safety net.

Other concerns are likely to arise. Congress' demand in the PROTECT Act that departures from the Guidelines be closely regulated and monitored is eviscerated—for there can be no "departure" from a mere suggestion. How will a judge go about determining how much deference to give to the applicable Guidelines range? How will a court of appeals review for reasonableness a district court's decision that the need for "just punishment" and "adequate deterrence to criminal conduct" simply outweighs the considerations contemplated by the Sentencing Commission? See 18 U. S. C. §§ 3553(a)(2)(A)–(B). What if a sentencing judge determines that a defendant's need for "educational or vocational training, medical care, or other correctional treatment in the most effective manner," § 3553(a)(2)(D), requires disregarding the stiff Guidelines range Congress presumably preferred? These questions will arise in every case in the federal system under the Court's system. Regrettably, these are exactly the sort of questions Congress hoped that sentencing judges would not ask after the SRA.

The consequences of such a drastic change—unaided by the usual processes of legislative deliberation—are likely to be sweeping. For example, the majority's unnecessarily broad remedy sends every federal sentence back to the drawing board, or at least into the novel review for "reasonableness," regardless of whether those individuals' constitu-

tional rights were violated. It is highly unlikely that the mere application of "prudential doctrines" will mitigate the consequences of such a gratuitous change.

The majority's remedy was not the inevitable result of the Court's holding that *Blakely* applies to the Guidelines. Neither *Apprendi*, nor *Blakely*, nor these cases made determinate sentencing unconstitutional.[17] Merely requiring all applications of the Guidelines to comply with the Sixth Amendment would have allowed judges to distinguish harmless error from error requiring correction, would have required no more complicated procedures than the procedural regime the majority enacts today, and, ultimately, would have left most sentences intact.

Unlike a rule that would merely require judges and prosecutors to comply with the Sixth Amendment, the Court's systematic overhaul turns the entire system on its head *in every case*, and, in so doing, runs contrary to the central purpose that motivated Congress to act in the first instance. Moreover, by repealing the right to a determinate sentence that Congress established in the SRA, the Court has effectively eliminated the very constitutional right *Apprendi* sought to vindicate. No judicial remedy is proper if it is "not commensurate with the constitutional violation to be repaired." *Hills* v. *Gautreaux*, 425 U. S. 284, 294 (1976). The Court's system fails that test, frustrates Congress' principal goal in

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[17] Moreover, even if the change to an indeterminate system were necessary, the Court could have minimized the consequences to the system by limiting the application of its holding to those defendants on direct review who actually suffered a Sixth Amendment violation. *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), does not require blind application of every part of this Court's holdings to all pending cases, but rather, requires that we apply any new "rule to all *similar cases* pending on direct review." *Id.*, at 323. For obvious reasons, not *all* pending cases are made *similar* to Booker's and Fanfan's merely because they involved an application of the Guidelines.

enacting the SRA, and violates the tradition of judicial restraint that has heretofore limited our power to overturn validly enacted statutes.

I respectfully dissent.

JUSTICE SCALIA, dissenting in part.

I join the portions of the opinion of the Court that are delivered by JUSTICE STEVENS. I also join JUSTICE STEVENS's dissent, with the exception of Part III[1] and footnote 17. I write separately mainly to add some comments regarding the change that the remedial majority's handiwork has wrought (or perhaps—who can tell?—has not wrought) upon appellate review of federal sentencing.

The remedial majority takes as the North Star of its analysis the fact that Congress enacted a "judge-based sentencing system." *Ante*, at 265 (opinion of BREYER, J.). That seems to me quite misguided. Congress did indeed expect judges to make the factual determinations to which the Guidelines apply, just as it expected the Guidelines to be mandatory. But which of those expectations was central to the congressional purpose is not hard to determine. No headline describing the Sentencing Reform Act of 1984 (Act) would have read "Congress reaffirms judge-based sentencing" rather than "Congress prescribes standardized sentences." JUSTICE BREYER's opinion for the Court repeatedly acknowledges that the primary objective of the Act was to reduce

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[1] Part III of JUSTICE STEVENS's dissent relies in large part on legislative history. I agree with his assertion that "[t]he text of the law that actually passed Congress . . . should be more than sufficient to demonstrate Congress' unmistakable commitment to a binding Guidelines system." *Ante*, at 294. I would not resort to committee reports and statements by various individuals, none of which constitutes action taken or interpretations adopted *by Congress*. "One determines what Congress would have done by examining what it did." *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 560 (2001) (SCALIA, J., dissenting).

sentencing disparity.[2] Inexplicably, however, the opinion concludes that the *manner* of achieving uniform sentences was more important to Congress than actually achieving uniformity—that Congress was so attached to having *judges* determine "real conduct" on the basis of bureaucratically prepared, hearsay-riddled presentence reports that it would rather lose the binding nature of the Guidelines than adhere to the old-fashioned process of having *juries* find the facts that expose a defendant to increased prison time. See *ante*, at 253–254, 265. The majority's remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing.

That is the plain effect of the remedial majority's decision to excise 18 U. S. C. § 3553(b)(1) (Supp. IV). See *ante*, at 259. District judges will no longer be told they "shall impose a sentence . . . within the range" established by the Guidelines. § 3553(b)(1). Instead, under § 3553(a), they will need only to "consider" that range as one of many factors, including "the need for the sentence . . . to provide just punishment for the offense," § 3553(a)(2)(A) (2000 ed.), "to afford adequate deterrence to criminal conduct," § 3553(a)(2)(B), and "to protect the public from the further crimes of the defendant," § 3553(a)(2)(C). The statute provides no order

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[2] See, *e. g.*, *ante*, at 246 (noting that Congress intended the Guidelines system to achieve "increased uniformity of sentencing"); *ante*, at 250 (referring to "diminish[ing] sentencing disparity" as "Congress' basic statutory goal"); *ante*, at 255 ("Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing"); *ante*, at 267 (referring to "Congress' basic objective of promoting uniformity in sentencing"); see also United States Sentencing Commission, Fifteen Years of Guidelines Sentencing xvi (Nov. 2004) ("Sentencing reform has had its greatest impact controlling disparity arising from the source at which the guidelines themselves were targeted—judicial discretion"); *id.*, at 140 ("[T]he guidelines have succeeded at the job they were principally designed to do: reduce unwarranted disparity arising from differences among judges").

of priority among all those factors, but since the three just mentioned are the fundamental criteria governing penology, the statute—absent the mandate of § 3553(b)(1)—authorizes the judge to apply his own perceptions of just punishment, deterrence, and protection of the public even when these differ from the perceptions of the Commission members who drew up the Guidelines. Since the Guidelines are not binding, in order to comply with the (oddly) surviving requirement that the court set forth "the specific reason for the imposition of a sentence different from that described" in the Guidelines, § 3553(c)(2), the sentencing judge need only state that "this court does not believe that the punishment set forth in the Guidelines is appropriate for this sort of offense."[3] That is to say, district courts have discretion to sentence anywhere within the ranges authorized by statute—much as they were generally able to do before the Guidelines came into being. To be sure, factor (6) is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," § 3553(a)(6) (2000 ed.), but this would require a judge to adhere to the Guidelines only if all other judges had to adhere to the Guidelines (which they certainly do not, as the Court holds today) or if all other judges could at least be expected to adhere to the Guidelines (which they certainly cannot, given the notorious unpopularity of the Guidelines with many district judges). Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the Guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the

[3] Although the Guidelines took pre-existing sentencing practices into account, they are the product of *policy decisions* by the Sentencing Commission—including, for instance, decisions to call for sentences "significantly more severe than past practice" for the "most frequently sentenced offenses in the federal courts." *Id.*, at 47. If those policy decisions are no longer mandatory, the sentencing judge is free to disagree with them.

majority thought otherwise—if it thought the Guidelines not only had to be "considered" (as the amputated statute requires) but had generally to be followed—its opinion would surely say so.[4]

As frustrating as this conclusion is to the Act's purpose of uniform sentencing, it at least establishes a clear and comprehensible regime—essentially the regime that existed before the Act became effective. That clarity is eliminated, however, by the remedial majority's surgery on 18 U. S. C. § 3742 (2000 ed. and Supp. IV), the provision governing appellate review of sentences. Even the most casual reading of this section discloses that its purpose—its *only* purpose—is to enable courts of appeals to enforce conformity with the Guidelines. All of the provisions of that section that impose a review obligation beyond what existed under prior law[5] are related to the district judge's obligations under the Guidelines. If the Guidelines are no longer binding, one would think that the provision designed to ensure compliance with them would, in its totality, be inoperative. The Court holds otherwise. Like a black-robed Alexander cutting the Gordian knot, it simply severs the purpose of the review provisions from their text, holding that only subsection (e), which sets forth the determinations that the court of appeals must make, is inoperative, whereas all the rest of § 3742 subsists—including, *mirabile dictu*, subsection (f),

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[4] The closest the remedial majority dares come to an assertion that the Guidelines must be followed is the carefully crafted statement that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Ante*, at 264. The remedial majority also notes that the Guidelines represent what the Sentencing Commission "finds to be better sentencing practices." *Ante*, at 263. True enough, but the Commission's view of what is "better" is no longer authoritative, and district judges are free to disagree—as are appellate judges.

[5] Paragraph (e)(1) requires a court of appeals to determine whether a sentence "was imposed in violation of law." 18 U. S. C. § 3742. Courts of appeals had of course always done this.

entitled "Decision and disposition," which *tracks* the determinations required by the severed subsection (e) and specifies *what disposition* each of those determinations is to produce. This is rather like deleting the ingredients portion of a recipe and telling the cook to proceed with the preparation portion.[6]

Until today, appellate review of sentencing discretion has been limited to instances prescribed by statute. Before the Guidelines, federal appellate courts had little experience reviewing sentences for anything but legal error. "[W]ell-established doctrine," this Court said, "bars [appellate] review of the exercise of sentencing discretion." *Dorszynski* v. *United States*, 418 U. S. 424, 443 (1974). "[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Id.*, at 431–432 (citing cases). When it established the Guidelines regime, Congress expressly provided for appellate review of sentences in specified circumstances, but the Court has been appropriately chary of aggrandizement, refusing to treat § 3742 as a blank check to appellate courts. Thus, in 1992, the Court recognized that Congress's grant of "*limited* appellate review of sentencing decisions . . . did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Williams* v. *United States*, 503 U. S. 193, 205 (emphasis added).

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[6] In the face of this immense reality, it is almost captious to point out that some of the text of the preserved subsection (f) plainly assumes the binding nature of the Guidelines—for example, the reference to a "sentence . . . imposed as a result of an incorrect application of the sentencing guidelines," § 3742(f)(1) (Supp. 2004), and the reference to a "departure . . . based on an impermissible factor," § 3742(f)(2). Moreover, paragraph (f)(1) requires the appellate court to "remand . . . for further sentencing proceedings" any case in which the sentence was imposed "as a result of an incorrect application of the sentencing guidelines." It is incomprehensible how or why this instruction can be combined with an obligation upon the appellate court to conduct its own independent evaluation of the "reasonableness" of a sentence.

Notwithstanding § 3742, much remained off limits to the courts of appeals: "The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left *solely* to the sentencing court." *Ibid.* (emphasis added). Similarly, in 1996, the Court took pains to note that the § 3742 power to engage in "limited appellate review" of Guidelines *departures* did not "vest in appellate courts wide-ranging authority over district court sentencing decisions." *Koon* v. *United States*, 518 U. S. 81, 97. The Court repeated its caution that "'[t]he development of the guideline sentencing regime'" did not allow appellate review "'except to the extent specifically directed by statute.'" *Ibid.* (quoting *Williams*, *supra*, at 205).

Today's remedial opinion does not even pretend to honor this principle that sentencing discretion is unreviewable except pursuant to specific statutory direction. The discussion of appellate review begins with the declaration that, "despite the absence of § 3553(b)(1) (Supp. 2004), the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range . . .)," *ante*, at 260 (citing §§ 3742(a) and (b)); and the opinion later announces that the standard of review for all such appeals is "unreasonableness," *ante*, at 261, 264–265. This conflates different and distinct statutory authorizations of appeal and elides crucial differences in the statutory scope of review. Section 3742 specifies four different kinds of appeal,[7] setting forth for each the grounds of

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[7] The four kinds of appeal arise when, respectively,

(1) the sentence is "imposed in violation of law," §§ 3742(a)(1), (b)(1), (e)(1), (f)(1) (2000 ed. and Supp. IV);

(2) the sentence is "imposed as a result of an incorrect application of the sentencing guidelines," §§ 3742(a)(2), (b)(2), (e)(2), (f)(1);

(3) the sentence is either above or below "the applicable guideline range," §§ 3742(a)(3), (b)(3), (e)(3), (f)(2); and

appeal permitted to the defendant and the Government (§§ 3742(a) and (b)), the manner in which each ground should be considered (§ 3742(e)), and the permissible dispositions (§ 3742(f)). There is no one-size-fits-all "unreasonableness" review. The power to review a sentence for reasonableness arises only when the sentencing court has departed from "the applicable guideline range." § 3742(f)(2); cf. *United States* v. *Soltero-Lopez*, 11 F. 3d 18, 19 (CA1 1993) (Breyer, C. J.) ("[T]he sentencing statutes . . . provide [a defendant] with only a very narrow right of appeal" because the power "to set aside a departure that is 'unreasonable' " appears "in the context of other provisions that permit defendants to appeal only upward . . . departures"). This Court has expressly rejected the proposition that there may be a "reasonable[ness]" inquiry when a sentence is imposed as a result of an incorrect application of the Guidelines. See *Williams*, *supra*, at 201.

The Court claims that "a statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly*." *Ante*, at 260 (opinion of BREYER, J.). Perhaps so. But we have before us a statute that *does* explicitly set forth a standard of review. The question is, when the Court has *severed* that standard of review (contained in § 3742(e)), does it make any sense to look for some congressional "implication" of a *different* standard of review in the remnants of the statute that the Court has left standing? Only in Wonderland. (This may explain in part why, as JUSTICE STEVENS's dissent correctly observes, *ante*, at 282, none of the numerous persons and organizations filing briefs as parties or *amici* in these cases—all of whom filed this side of the looking-glass—proposed, or I think even imagined, the remedial majority's wonderful disposition.) Unsurprisingly, none of the three cases cited by the Court used the power of impli-

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(4) no guideline is applicable and the sentence is "plainly unreasonable," §§ 3742(a)(4), (b)(4), (e)(4), (f)(2).

cation to fill a gap created by the Court's own removal of an explicit standard.[8] The Court's need to create a new, "implied" standard of review—however "linguistically" "fair," *ante*, at 262—amounts to a confession that it has exceeded its powers. According to the "well established" standard for severability, the unconstitutional part of a statute "may be dropped if what is left is *fully operative* as a law." *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987) (emphasis added and internal quotation marks omitted). Severance is not possible "if the balance of the legislation is incapable of functioning independently." *Ibid.* The Court's need to supplement the text that remains after severance suggests that it is engaged in "redraft[ing] the statute" rather than just implementing the valid portions of it. *United States* v. *Treasury Employees*, 513 U. S. 454, 479, and n. 26 (1995); see also *id.*, at 502, and n. 8 (REHNQUIST, C. J., dissenting); *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 884–885 (1997).

Even assuming that the Court ought to be inferring standards of review to stanch the bleeding created by its aggressive severance of § 3742(e), its "unreasonableness" standard is not, as it claims, consistent with the "related statutory language" or with "appellate sentencing practice during the last two decades." *Ante*, at 260, 262. As already noted, sentences within the Guidelines range have not previously been reviewed for reasonableness. Indeed, the very concept of having a unitary standard of review for all kinds of appeals authorized by §§ 3742(a) and (b) finds no support in statutory language or established practice of the last two decades. Although a "reasonableness" standard did appear in § 3742(e)(3) until 2003, it never extended beyond review of deliberate departures from the Guidelines range. See 18 U. S. C. § 3742(e)(3) (2000 ed.); see also §§ 3742(f)(2)(A), (B) (prescribing how to dispose on appeal of a sentence that

[8] *Pierce* v. *Underwood*, 487 U. S. 552, 558–560 (1988), *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 403–405 (1990), and *Koon* v. *United States*, 518 U. S. 81, 99 (1996).

is "outside the applicable guideline range and is unreasonable"). According to the statistics cited by the Court, that standard applied to only 16.7% of federal sentencing appeals in 2002, see *ante*, at 262 (opinion of BREYER, J.), but the Court would now have it apply across the board to all sentencing appeals, even to sentences within "the applicable guideline range," where there is no legal error or misapplication of the Guidelines.

There can be no doubt that the Court's severability analysis has produced a scheme dramatically different from anything Congress has enacted since 1984. Sentencing courts are told to "provide just punishment" (among other things), and appellate courts are told to ensure that district judges are not "unreasonable." The worst feature of the scheme is that no one knows—and perhaps no one is meant to know—how advisory Guidelines and "unreasonableness" review will function in practice. The Court's description of what it anticipates is positively Delphic: "These features of the remaining system . . . continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary. We can find no feature of the remaining system that tends to hinder, rather than to further, these basic objectives." *Ante*, at 264–265 (citation omitted).

As I have suggested earlier, any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional. But the remedial majority's gross exaggerations (it says that the "practical standard of review" it prescribes is "already familiar to appellate courts" and "consistent with appellate sentencing practice during the last two decades," *ante*, at 261, 262)[9] may lead some courts of appeals to con-

[9] Deciding whether a departure from a mandatory sentence (for a reason not taken into account in the Guidelines) is "unreasonable" (as § 3742(e)(3) required), or whether a sentence imposed for one of the rare offenses not

clude—may indeed be designed to lead courts of appeals to conclude—that little has changed. Bear in mind that one of the most significant features of the remedial majority's scheme of "unreasonableness" review is that it requires courts of appeals to evaluate each sentence *individually* for reasonableness, rather than apply the cookie-cutter standards of the mandatory Guidelines (within the correct Guidelines range, affirm; outside the range without adequate explanation, vacate and remand). A court of appeals faced with this daunting prospect might seek refuge in the familiar and continue (as the remedial majority invites, though the merits majority forbids) the "appellate sentencing practice during the last two decades," *ante*, at 262 (opinion of BREYER, J.). At the other extreme, a court of appeals might handle the new workload by approving virtually any sentence within the statutory range that the sentencing court imposes, so long as the district judge goes through the appropriate formalities, such as expressing his consideration of and disagreement with the Guidelines sentence. What I anticipate will happen is that "unreasonableness" review will produce a discordant symphony of different standards, varying from court to court and judge to judge, giving the lie to the remedial majority's sanguine claim that "no feature" of its avant-garde Guidelines system will "ten[d] to hinder" the avoidance of "excessive sentencing disparities." *Ante*, at 265.

In *Blakely* v. *Washington*, 542 U. S. 296 (2004), the four dissenting Justices accused the Court of ignoring "the havoc it is about to wreak on trial courts across the country." *Id.*, at 324 (opinion of O'CONNOR, J.). And that harsh assessment, of course, referred to just a temporary and unavoid-

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covered by the Guidelines—though surrounded by *mandatory* sentences for related and analogous offenses—is "plainly unreasonable" (as §3742(e)(4) required), differs *toto caelo* from determining, in the absence of *any mandatory scheme*, that a particular sentence is "unreasonable."

able uncertainty, until the Court could get before it a case properly presenting the constitutionality of the mandatory Guidelines. Today, the same Justices wreak havoc on federal district and appellate courts quite needlessly, and for the indefinite future. Will appellate review for "unreasonableness" preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges? Will it simply add another layer of unfettered judicial discretion to the sentencing process? Or will it be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion? Time may tell, but today's remedial majority will not.

I respectfully dissent.

JUSTICE THOMAS, dissenting in part.

I join JUSTICE STEVENS' opinion for the Court, but I dissent from JUSTICE BREYER's opinion for the Court. While I agree with JUSTICE STEVENS' proposed remedy and much of his analysis, I disagree with his restatement of severability principles and reliance on legislative history, and thus write separately.

The Constitution prohibits allowing a judge alone to make a finding that raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant. Application of the Federal Sentencing Guidelines resulted in impermissible factfinding in Booker's case, but not in Fanfan's. Thus Booker's sentence is unconstitutional, but Fanfan's is not. Rather than applying the usual presumption in favor of severability, and leaving the Guidelines standing insofar as they may be applied without any constitutional problem, the remedial majority converts the Guidelines from a mandatory system to a discretionary one. The majority's solution fails to tailor the remedy to the wrong, as this Court's precedents require.

I

When a litigant claims that a statute is unconstitutional as applied to him, and the statute is in fact unconstitutional as applied, we normally invalidate the statute only as applied to the litigant in question. We do not strike down the statute on its face. In the typical case, "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." *United States* v. *Treasury Employees*, 513 U. S. 454, 478 (1995); see also *Renne* v. *Geary*, 501 U. S. 312, 323–324 (1991); *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 484–485 (1989); *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 501–504 (1985). Absent an exception such as First Amendment overbreadth, we will facially invalidate a statute only if the plaintiff establishes that the statute is invalid in all of its applications. *United States* v. *Salerno*, 481 U. S. 739, 745 (1987).

Booker's case presents an as-applied challenge. Booker challenges Guidelines enhancements that, based on fact-finding by a judge alone, raised his sentence above the range legally mandated for his base offense level, determined by reference to the jury verdict. In effect, he contends that the Guidelines supporting the enhancements, and the Sentencing Reform Act of 1984 (SRA) that makes the Guidelines enhancements mandatory, were unconstitutionally applied to him. (Fanfan makes no similar contention, as he seeks to uphold the District Court's application of the Guidelines.)

A provision of the SRA, 18 U. S. C. § 3553(b)(1) (Supp. IV), commands that the court "*shall* impose a sentence of the kind, and within the range, referred to in subsection (a)(4)," which in turn refers to the Guidelines. (Emphasis added.) The Court reasons that invalidating § 3553(b)(1) would render the Guidelines nonbinding and therefore con-

stitutional. Hence, it concludes, § 3553(b)(1) must fall on its face.[1]

The majority's excision of § 3553(b)(1) is at once too narrow and too broad. It is too narrow in that it focuses only on § 3553(b)(1), when Booker's unconstitutional sentence enhancements stemmed not from § 3553(b)(1) alone, but from the combination of § 3553(b)(1) and individual Guidelines. Specifically, in Booker's case, the District Court increased the base offense level[2] under these Guidelines:[3] USSG § 1B1.3(a)(2), which instructs that the base offense level shall (for certain offenses) take into account all acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction"; § 2D1.1(c)(2), which sets the offense level for 500g to 1.5kg of cocaine base at 36; and § 3C1.1, which provides for a two-level increase in the offense level for obstruction of justice. The court also implicitly applied § 1B1.1, which provides general instructions for applying the Guidelines, including determining the base offense level and applying appropriate adjustments; § 1B1.11(b)(2),

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[1] Because the majority invalidates 18 U. S. C. § 3553(b)(1) (Supp. IV) on its face, it is driven also to invalidate § 3742(e) (2000 ed. and Supp. IV), which establishes standards of review for sentences and is premised on the binding nature of the Guidelines. See, *e. g.*, § 3742(e)(2) (2000 ed.) (directing the court of appeals to determine whether the sentence "was imposed as a result of an incorrect application of the sentencing guidelines"); § 3742(e)(3) (directing the court of appeals to determine whether the sentence "is outside the applicable guideline range" and satisfies other factors). Given that (as I explain) there is no warrant for striking § 3553(b)(1) on its face, striking § 3742(e) as well only does further needless violence to the statutory scheme.

[2] Booker's base offense level (supported by the facts the jury found) was 32. See United States Sentencing Commission, Guidelines Manual § 2D1.1(c)(4) (Nov. 2003) (USSG) (setting the base offense level for the crime of possession with intent to sell 50 to 150 grams of cocaine base at 32).

[3] The District Court applied the version of the Guidelines effective November 1, 2003.

which requires that "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety"; § 6A1.3(b) p. s.,[4] which provides that "[t]he court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P."; and Rule 32(c)(1),[5] which in turn provided:

> "At the sentencing hearing, the court . . . must rule on any unresolved objections to the presentence report. . . . For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing."

Section 3553(b)(1), the listed Guidelines and policy statement, and Rule 32(c)(1) are unconstitutional as applied to Booker. Under their authority, the judge, rather than the jury, found the facts necessary to increase Booker's offense level pursuant to the listed provisions; the judge found those facts by a preponderance of the evidence, rather than beyond a reasonable doubt; and, on the basis of these findings, the judge imposed a sentence above the maximum legally permitted by the jury's findings. Thus, in Booker's case, the concerted action of § 3553(b)(1) *and* the operative Guidelines *and* the relevant Rule of Criminal Procedure resulted in un-

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[4] I take no position on whether USSG § 6A1.3, a policy statement, bound the District Court. Cf. *Stinson* v. *United States*, 508 U. S. 36, 42–43 (1993); *Williams* v. *United States*, 503 U. S. 193, 200–201 (1992). In any case, Rule 32(c)(1), which had the same effect as § 6A1.3, certainly bound the court.

[5] In 2002, Rule 32(c)(1) was amended and replaced with Rule 32(i)(3). The new Rule provides, in substantially similar fashion, that at sentencing, the court "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. Rule Crim. Proc. 32(i)(3)(B) (2003).

constitutional judicial factfinding. The majority cannot pinpoint § 3553(b)(1) alone as the source of the violation.

At the same time, the majority's remedy is far too broad. We have before us only a single unconstitutional application of § 3553(b)(1) (and accompanying parts of the sentencing scheme). In such a case, facial invalidation is unprecedented. It is particularly inappropriate here, where it is evident that § 3553(b)(1) is entirely constitutional in numerous other applications. Fanfan's case is an example: The judge applied the Guidelines to the extent supported by the jury's findings. This application of § 3553(b)(1) was constitutional. To take another example, when the Government seeks a sentence within the Guidelines range supported by the jury's verdict, applying § 3553(b)(1) to restrict the judge's discretion to that Guidelines range is constitutional.

Section 3553(b)(1) is also constitutional when the Government seeks a sentence above the Guidelines range supported by the jury's verdict, but proves the facts supporting the enhancements to a jury beyond a reasonable doubt. Section 3553(b)(1) provides that "the court shall *impose* a sentence of the kind, and within the range," set by the Guidelines. (Emphasis added.) It says nothing, however, about the procedures the court must employ to determine the sentence it ultimately "impose[s]." It says nothing about whether, before imposing a sentence, the court may submit sentence-enhancing facts to the jury; and it says nothing about the standard of proof. Because it does not address at all the procedures for Guidelines sentencing proceedings, § 3553(b)(1) comfortably accommodates cases in which a court determines a defendant's Guidelines range by way of jury factfinding or admissions rather than judicial factfinding.

The Constitution does not prohibit what § 3553(b)(1) accomplishes—binding district courts to the Guidelines. It prohibits allowing a judge alone to make a finding that raises the sentence beyond the sentence that could have lawfully

been imposed by reference to facts found by the jury or admitted by the defendant. Many applications of § 3553(b)(1) suffer from no such vice. Yet the majority, by facially invalidating the statute, also invalidates these unobjectionable applications of the statute and thereby ignores the longstanding distinction between as-applied and facial challenges.

Just as there is no reason to strike § 3553(b)(1) on its face, there is likewise no basis for striking any Guideline at issue here on its face. Respondents have not established that USSG § 1B1.3(a)(2), § 2D1.1(c)(2), § 3C1.1, or § 1B1.11(b)(2) is invalid in all its applications, as *Salerno* requires. To the contrary, numerous applications of these provisions are valid. Such applications include cases in which the defendant admits the relevant facts or the jury finds the relevant facts beyond a reasonable doubt. Like § 3553(b)(1), USSG §§ 1B1.3(a)(2), 2D1.1(c)(2), 3C1.1, and 1B1.11(b)(2) say nothing about who must find the facts supporting enhancements, or what standard of proof the prosecution must satisfy. They simply attach effects to certain facts; they do not prescribe procedures for determining those facts. Even § 1B1.1, which provides instructions for applying the Guidelines, directs an order in which the various provisions are to be applied ("[d]etermine the base offense level," § 1B1.1(b), then "[a]pply the adjustments," § 1B1.1(c)), but says nothing about the specific procedures a sentencing court may employ in determining the base offense level and applying adjustments.

Moreover, there is no basis for facially invalidating § 6A1.3 or Rule 32(c)(1). To be sure, § 6A1.3(b) and Rule 32(c)(1) prescribe procedure: They require the judge, acting alone, to resolve factual disputes. When Booker was sentenced, § 6A1.3(b) provided that "[t]he court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P." At the time, the relevant portions of Rule 32(c)(1) provided:

> "At the sentencing hearing, the court . . . must *rule* on any unresolved objections to the presentence report. . . . For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." (Emphasis added.)

The natural meaning of "the court . . . must rule" is that the *judge*, without the jury, must resolve factual disputes as necessary. This Rule of Criminal Procedure, as applied at Booker's sentencing hearing, required the judge to make findings that increased Booker's offense level beyond the Guidelines range authorized by the jury. The application of the Rule to Booker therefore was unconstitutional.

Nonetheless, the Rule has other valid applications. For example, the Rule is valid when it requires the sentencing judge, without a jury, to resolve a factual dispute in order to decide where within the jury-authorized Guidelines range a defendant should be sentenced. The Rule is equally valid when it requires the judge to resolve a factual dispute in order to support a downward adjustment to the defendant's offense level.[6]

Given the significant number of valid applications of all portions of the current sentencing scheme, we should not facially invalidate any particular section of the Federal Rules of Criminal Procedure, the Guidelines, or the SRA. Instead, we should invalidate only the application to Booker,

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[6] The commentary to §6A1.3 states that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." The Court's holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.

at his previous sentencing hearing, of § 3553(b)(1); USSG §§ 1B1.3(a)(2), 2D1.1(c)(2), 3C1.1, 1B1.1, 1B1.11(b)(2), and 6A1.3(b); and Rule 32(c)(1).

II

Invalidating § 3553(b)(1), the Guidelines listed above, and Rule 32(c)(1) *as applied* to Booker by the District Court leaves the question whether the scheme's unconstitutional application to Booker can be severed from the scheme's many other constitutional applications to defendants like Fanfan. Severability doctrine is grounded in a presumption that Congress intends statutes to have effect to the full extent the Constitution allows.[7] *Regan* v. *Time, Inc.*, 468 U. S. 641, 652 (1984); Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1959–1963 (1997) (hereinafter Vermeule). The severability issue may arise when a court strikes either a provision of a statute or an application of a provision. Severability of provisions is perhaps more visible than severability of applications in our case law. See, *e. g.*, *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684–697 (1987) (severing unconstitutional legislative veto provision from other provisions).[8]

However, severability questions arise from unconstitutional applications of statutes as well. Congress often expressly provides for severance of unconstitutional applica-

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[7] I assume, without deciding, that our severability precedents—which require a nebulous inquiry into hypothetical congressional intent—are valid, a point the parties do not contest. I also assume that our doctrine on severability and facial challenges applies equally to regulations and to statutes. See *Reno* v. *Flores*, 507 U. S. 292, 300–301 (1993).

[8] See also 2 U. S. C. § 454 ("If *any provision of this Act*, or the application thereof to any person or circumstance, is held invalid, the validity of *the remainder of the Act* and the application of such provision to other persons and circumstances shall not be affected thereby" (emphasis added)); 5 U. S. C. § 806(b) (similar); 6 U. S. C. § 102 (2000 ed., Supp. II) (similar); 7 U. S. C. § 136x (similar); 15 U. S. C. § 79z–6 (similar); 29 U. S. C. § 114 (similar); 21 U. S. C. § 901 ("If a provision of this chapter is held invalid, all valid provisions that are severable shall remain in effect").

tions.[9] This Court has acknowledged the severability of applications in striking down some applications of a statute while leaving others standing. In *Brockett*, 472 U. S., at 504–507, the Court invalidated a state moral nuisance statute only insofar as it reached constitutionally protected materials, relying on the statute's severability clause. And in *Tennessee* v. *Garner*, 471 U. S. 1, 4 (1985), the Court considered a state statute that authorized police to use "'all the necessary means to effect [an] arrest.'" The Court held the statute unconstitutional insofar as it allowed the use of deadly force against an unarmed, nondangerous suspect; but it declined to invalidate the statute on its face, specifically noting that the statute could be applied constitutionally in other circumstances. *Id.*, at 11–12. In *Brockett* and *Garner*, then, the Court recognized that the unconstitutional applications of the statutes were severable from the constitutional applications. The Court fashioned the remedy narrowly, in keeping with the usual presumption of severability.

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[9] See 2 U. S. C. § 454 ("If any provision of this Act, or the *application* thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the *application of such provision to other persons and circumstances* shall not be affected thereby" (emphasis added)); 5 U. S. C. § 806(b) (similar); 6 U. S. C. § 102 (2000 ed., Supp. II) (similar); 7 U. S. C. § 136x (similar); 15 U. S. C. § 79z–6 (similar); 29 U. S. C. § 114 (similar); 21 U. S. C. § 901 (in relevant part, "[i]f a provision of this chapter is held invalid in one or more of its applications, the provision shall remain in effect in all its valid applications that are severable"); see also Vermeule 1950, n. 26 ("There is a common misconception that severability analysis refers only to the severance of provisions or subsections enumerated or labeled independently in the official text of the statute. In fact, however, severability problems arise not only with respect to different sections, clauses or provisions of a statute, but also with respect to applications of a particular statutory provision when some (but not all) of those applications are unconstitutional"); Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76, 78–79 (1937) ("One [type of severability question] relates to situations in which some *applications* of the same language in a statute are valid and other applications invalid").

I thus disagree with JUSTICE STEVENS that severability analysis does not apply. *Ante*, at 280–281, and n. 6 (opinion dissenting in part).[10] I acknowledge that, as a general matter, the Court often disposes of as-applied challenges to a statute by simply invalidating particular applications of the statute, without saying anything at all about severability. See *United States* v. *Grace*, 461 U. S. 171, 183 (1983) (concluding that statute that prohibited carrying banners in the United States Supreme Court Building and on its grounds was unconstitutional as applied to the sidewalks surrounding the building); *Edenfield* v. *Fane*, 507 U. S. 761, 763 (1993) (striking down a solicitation ban on certified public accountants as applied "in the business context"); *Treasury Employees*, 513 U. S., at 501–503 (REHNQUIST, C. J., joined by SCALIA and THOMAS, JJ., dissenting) (expressing view that injunction against honoraria ban should be tailored to unconstitutional applications).

Such decisions (in which the Court is silent as to applications not before it) might be viewed as having conducted an implicit severability analysis. See *id.*, at 485–489 (O'CONNOR, J., concurring in judgment in part and dissenting in part). A better view is that the parties in those cases could have raised the issue of severability, but did not bother, because (as is often the case) there was no arguable reason to defeat the presumption of severability. The unconstitutional applications of the statute were fully independent of

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[10] I do, however, agree with JUSTICE STEVENS that JUSTICE BREYER grossly distorts severability analysis by using severability principles to determine which provisions the Court should strike as unconstitutional. *Ante*, at 281–284 (STEVENS, J., dissenting in part). JUSTICE BREYER's severability analysis asks which provisions must be cut from the statute to fix the constitutional problem. *Ante*, at 245–249, 258 (opinion of the Court). Normally, however, a court (1) declares a provision or application unconstitutional, using substantive constitutional doctrine (not severability doctrine), and only then (2) asks (under severability principles) whether the remainder of the Act can be left standing. JUSTICE BREYER skips the first step, which is a necessary precursor to proper severability analysis.

and severable from the remaining constitutional applications. Here, the question is squarely presented: The parties press it, and there is extraordinary reason to clarify the remedy, namely, that our decision potentially affects every sentencing by the federal courts.

I therefore proceed to the severability question—whether the unconstitutional application of § 3553(b)(1); USSG §§ 1B1.3, 2D1.1(c)(2), 3C1.1, 1B1.1, 1B1.11(b)(2), and 6A1.3; and Rule 32(c)(1) to Booker is severable from the constitutional applications of these provisions. That is, even though we have invalidated the application of these provisions to Booker, may other defendants be sentenced pursuant to them? We presume that the unconstitutional application is severable. See, *e. g.*, *Regan*, 468 U. S., at 653. This presumption is a manifestation of *Salerno*'s general rule that we should not strike a statute on its face unless it is invalid in all its applications. Unless the Legislature clearly would not have enacted the constitutional applications independently of the unconstitutional application, the Court leaves the constitutional applications standing. 468 U. S., at 653.

Here, the presumption of severability has not been overcome. In light of the significant number of constitutional applications of the scheme, it is far from clear that Congress would not have passed the SRA or allowed Rule 32 to take effect, or that the Commission would not have promulgated the particular Guidelines at issue, had either body known that the application of the scheme to Booker was unconstitutional. *Ante*, at 274–279 (STEVENS, J., dissenting in part). As noted above, many applications of the Guidelines are constitutional: The defendant may admit the necessary facts; the Government may not seek enhancements beyond the offense level supported by the jury's verdict; the judge may find facts supporting an enhancement but (taking advantage of the overlap in Guidelines ranges) sentence the defendant within the jury-authorized range; or the jury may find the necessary facts.

Certainly it is not obvious that Congress would have preferred the entirely discretionary system that the majority fashions. The text and structure of the SRA show that Congress meant the Guidelines to bind judges. One of the purposes of the Commission, as set forth in the SRA, was to

> "provide *certainty* and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U. S. C. § 991(b)(1)(B) (emphasis added).

Accordingly, Congress made the Guidelines mandatory and closely circumscribed courts' authority to depart from the Guidelines range. 18 U. S. C. § 3553(b)(1) (Supp. IV). Congress also limited appellate review of sentences imposed pursuant to the Guidelines to instances in which the sentence was (1) in violation of law, (2) a result of an incorrect application of the Guidelines, (3) outside the applicable Guidelines range, or (4) in the absence of an applicable Guideline, plainly unreasonable. § 3742(e) (2000 ed. and Supp. IV). Striking down § 3553(b)(1) and the Guidelines only as applied to Booker (and other defendants who have received unconstitutional enhancements) would leave in place the essential framework of the mandatory system Congress created. Applying the Guidelines in a constitutional fashion affords some uniformity; total discretion, none. To suggest, as JUSTICE BREYER does, that a discretionary system would do otherwise, *ante*, at 249–253, 264 (opinion of the Court), either supposes that the system is discretionary in name only or overlooks the very nature of discretion. Either assumption is implausible.

The majority says that retaining the SRA and the Guidelines "engraft[s]" a jury trial requirement onto the sentencing scheme. *Ante*, at 246 (opinion of BREYER, J.). I am, of course, aware that, though severability analysis may proceed "by striking out or disregarding words [or, here, applications] that are in the [challenged] section," it may not proceed "by inserting [applications] that are not now there"; that would constitute legislation beyond our judicial power. *United States* v. *Reese*, 92 U. S. 214, 221 (1876). By allowing jury factfinding in some cases, however, we are no more "engrafting" a new requirement onto the statute than we do every time we invalidate a statute in some of the applications that the statute, on its face, appears to authorize. See, *e. g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491 (1985). I therefore do not find the "engraftment" label helpful as a means of judging the correctness of our severability analysis.

Granted, part of the severability inquiry is "whether the statute [as severed] will function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc.*, 480 U. S., at 685. Applying the Guidelines constitutionally (for instance, when admissions or jury findings support all upward enhancements) might seem at first glance to violate this principle. But so would the Government's proposal of applying the Guidelines as a whole to some defendants, but not others. The Court's solution violates it even more clearly by creating a system that eliminates the mandatory nature of the Guidelines. In the end, nothing except the Guidelines as written will function in a manner perfectly consistent with the intent of Congress, and the Guidelines as written are unconstitutional in some applications. While all of the remedial possibilities are thus, in a sense, second best, the solution JUSTICE STEVENS and I would adopt does the least violence to the statutory and regulatory scheme.

* * *

I would hold that § 3553(b)(1), the provisions of the Guidelines discussed above, and Rule 32(c)(1) are unconstitutional as applied to Booker, but that the Government has not overcome the presumption of severability. Accordingly, the unconstitutional application of the scheme in Booker's case is severable from the constitutional applications of the same scheme to other defendants. I respectfully dissent from the Court's contrary conclusion.

JUSTICE BREYER, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting in part.

The Court today applies its decisions in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and *Blakely* v. *Washington*, 542 U. S. 296 (2004), to the Federal Sentencing Guidelines. The Court holds that the Sixth Amendment requires a jury, not a judge, to find sentencing facts—facts about the *way* in which an offender committed the crime—where those facts would move an offender from lower to higher Guidelines ranges. I disagree with the Court's conclusion. I find nothing in the Sixth Amendment that forbids a sentencing judge to determine (as judges at sentencing have traditionally determined) the *manner* or *way* in which the offender carried out the crime of which he was convicted.

The Court's substantive holding rests upon its decisions in *Apprendi*, *supra*, and *Blakely*, *supra*. In *Apprendi*, the Court held that the Sixth Amendment requires juries to find beyond a reasonable doubt the existence of "any fact that increases the penalty for a crime" beyond "*the prescribed statutory maximum.*" 530 U. S., at 490 (emphasis added). In *Blakely*, the Court defined the latter term as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U. S., at 303 (emphasis in original). Today, the Court applies its *Blakely* definition to the Federal Sentencing Guidelines. I continue to disagree with the constitu-

tional analysis the Court set forth in *Apprendi* and in *Blakely*. But even were I to accept that analysis as valid, I would disagree with the way in which the Court applies it here.

I

THE CHIEF JUSTICE, JUSTICE O'CONNOR, JUSTICE KENNEDY, and I have previously explained at length why we cannot accept the Court's constitutional analysis. See *Blakely*, 542 U. S., at 314–326 (O'CONNOR, J., dissenting); *id.*, at 326–328 (KENNEDY, J., dissenting); *id.*, at 328–347 (BREYER, J., dissenting); *Harris* v. *United States*, 536 U. S. 545, 549–550 (2002) (KENNEDY, J., opinion of the Court); *id.*, at 569–572 (BREYER, J., concurring in part and concurring in judgment); *Apprendi*, 530 U. S., at 523–554 (O'CONNOR, J., dissenting); *id.*, at 555–556 (BREYER, J., dissenting); *Jones* v. *United States*, 526 U. S. 227, 264–272 (1999) (KENNEDY, J., dissenting); *Monge* v. *California*, 524 U. S. 721, 728–729 (1998) (O'CONNOR, J., opinion of the Court); *McMillan* v. *Pennsylvania*, 477 U. S. 79, 86–91 (1986) (REHNQUIST, C. J., opinion of the Court).

For one thing, we have found the Court's historical argument unpersuasive. See *Blakely*, *supra*, at 323 (O'CONNOR, J., dissenting); *Apprendi*, *supra*, at 525–528 (O'CONNOR, J., dissenting). Indeed, the Court's opinion today illustrates the historical mistake upon which its conclusions rest. The Court reiterates its view that the right of "'trial by jury has been understood to require'" a jury trial for determination of "'*the truth of every accusation.*'" *Ante*, at 239 (opinion of STEVENS, J.) (quoting *Apprendi*, *supra*, at 477; emphasis in original). This claim makes historical sense insofar as an "*accusation*" encompasses each factual *element* of the crime of which a defendant is accused. See, *e. g.*, *United States* v. *Gaudin*, 515 U. S. 506, 509–510, 522–523 (1995). But the key question here is whether that word also encompasses *sentencing facts*—facts about the offender (say, recidivism) or about the way in which the offender committed the crime

(say, the seriousness of the injury or the amount stolen) that help a sentencing judge determine a convicted offender's specific sentence.

History does not support a "right to jury trial" in respect to sentencing facts. Traditionally, the law has distinguished between facts that are elements of crimes and facts that are relevant only to sentencing. See, *e. g.*, *Almendarez-Torres* v. *United States*, 523 U. S. 224, 228 (1998); *Witte* v. *United States*, 515 U. S. 389, 399 (1995); *United States* v. *Watts*, 519 U. S. 148, 154 (1997) *(per curiam)*; *United States* v. *Dunnigan*, 507 U. S. 87, 97 (1993); *Mistretta* v. *United States*, 488 U. S. 361, 396 (1989). Traditionally, federal law has looked to judges, not to juries, to resolve disputes about sentencing facts. See, *e. g.*, Fed. Rule Crim. Proc. 32(a). Traditionally, those familiar with the criminal justice system have found separate, postconviction *judge*-run sentencing procedures sensible given the difficulty of obtaining relevant sentencing information before the moment of conviction. They have found those proceedings practical given the impracticality of the alternatives, say, two-stage (guilt, sentence) jury procedures. See, *e. g.*, Judicial Conference of the United States, Committee on Defender Services, Subcommittee on Federal Death Penalty Cases, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation 9–10 (May 1998). And, despite the absence of jury determinations, they have found those proceedings fair as long as the convicted offender has the opportunity to contest a claimed fact before the judge, and as long as the sentence falls within the maximum of the range that a congressional statute specifically sets forth.

The administrative rules at issue here, Federal Sentencing Guidelines, focus on *sentencing facts.* They circumscribe a federal judge's sentencing discretion in respect to such facts, but in doing so, they do not change the nature of those facts. The sentencing courts continue to use those facts, not to convict a person of a crime as a statute defines it, but to help

determine an appropriate punishment. Thus, the Court cannot ground today's holding in a "constitutional tradition assimilated from the common law" or in "the Magna Carta." *Ante*, at 238–239 (opinion of STEVENS, J.). It cannot look to the Framers for support, for they, too, enacted criminal statutes with indeterminate sentences, revealing their own understanding and acceptance of the judge's factfinding role at sentencing. See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112–118.

Indeed, it is difficult for the Court to find historical support other than in two recent cases, *Apprendi* and *Blakely*—cases that we, like lower courts, read not as confirming, but as confounding a pre-*Apprendi*, pre-*Blakely* legal tradition that stretches back a century or more. See, *e. g.*, *Williams* v. *New York*, 337 U. S. 241, 246 (1949); cf., *e. g.*, 375 F. 3d 508, 514 (CA7 2004) (case below) ("*Blakely* redefined 'statutory maximum'"); *United States* v. *Ameline*, 376 F. 3d 967, 973 (CA9 2004) ("*Blakely* court worked a sea change in the body of sentencing law"); *United States* v. *Pineiro*, 377 F. 3d 464, 468–469 (CA5 2004) (same); see also *United States* v. *Penaranda*, 375 F. 3d 238, 243, n. 5 (CA2 2004) (same, collecting cases).

For another thing, applied in the federal context of *mandatory* Guidelines, the Court's Sixth Amendment decision would risk unwieldy trials, a two-tier jury system, a return to judicial sentencing discretion, or the replacement of sentencing ranges with specific mandatory sentences. Cf. *Blakely*, 542 U. S., at 330–340 (BREYER, J., dissenting). The decision would pose a serious obstacle to congressional efforts to create a sentencing law that would mandate more similar treatment of like offenders, that would thereby diminish sentencing disparity, and that would consequently help to overcome irrational discrimination (including racial discrimination) in sentencing. See *id.*, at 315–316 (O'CONNOR, J., dissenting). These consequences would seem perverse when viewed through the lens of a Constitution that seeks a fair criminal process.

The upshot is that the Court's Sixth Amendment decisions—*Apprendi*, *Blakely*, and today's—deprive Congress and state legislatures of authority that is constitutionally theirs. Cf. *Blakely*, *supra*, at 326–328 (KENNEDY, J., dissenting); *Apprendi*, 530 U. S., at 544–545 (O'CONNOR, J., dissenting); *id.*, at 560–564 (BREYER, J., dissenting). The "sentencing function long has been a peculiarly shared responsibility among the Branches of Government." *Mistretta*, *supra*, at 390. Congress' share of this joint responsibility has long included not only the power to define crimes (by enacting statutes setting forth their factual elements) but also the power to specify sentences, whether by setting forth a range of individual-crime-related sentences (say, 0-to-10 years' imprisonment for bank robbery) or by identifying sentencing factors that permit or require a judge to impose higher or lower sentences in particular circumstances. See, *e. g.*, *Almendarez-Torres*, *supra*, at 228; *McMillan*, 477 U. S., at 85.

This last mentioned power is not absolute. As the Court suggested in *McMillan*, confirmed in *Almendarez-Torres*, and recognized but rejected in *Blakely*, one might read the Sixth Amendment as permitting "legislatures" to "establish legally essential [judge-determined] sentencing factors *within* [say, due process] *limits.*" *Blakely*, *supra*, at 307 (emphasis in original); cf. *Almendarez-Torres*, *supra*, at 228 (distinguishing between "elements" and "factors relevant only to . . . sentencing," and noting that, "[w]ithin limits, the question of which factors are which is normally a matter for Congress" (citation omitted)); *McMillan*, *supra*, at 88 (upholding a Pennsylvania statute in part because it gave "no impression of having been tailored to permit the [sentencing factor] finding to be a tail which wags the dog of the substantive offense"). But the power does give Congress a degree of freedom (within constraints of fairness) to choose to characterize a fact as a "sentencing factor," relevant only to punishment, or as an element of a crime, relevant to guilt or

innocence. The Court has rejected this approach apparently because it finds too difficult the judicial job of managing the "fairness" constraint, *i. e.*, of determining when Congress has overreached. But the Court has nowhere asked, "compared to what?" Had it done so, it could not have found the practical difficulty it has mentioned, *Blakely*, *supra*, at 307–308, sufficient to justify the severe limits that its approach imposes upon Congress' legislative authority.

These considerations—of history, of constitutionally relevant consequences, and of constitutional authority—have been more fully discussed in other opinions. See, *e. g.*, *Blakely*, 542 U. S., at 314–326 (O'CONNOR, J., dissenting); *id.*, at 327–328 (KENNEDY, J., dissenting); *id.*, at 328–347 (BREYER, J., dissenting); *Harris*, 536 U. S., at 549–550, 569–572; *Apprendi*, *supra*, at 523–554, 555–556; *McMillan*, *supra*, at 86–91. I need not elaborate them further.

II

Although the considerations just mentioned did not dissuade the Court from its holdings in *Apprendi* and *Blakely*, I should have hoped they would have dissuaded the Court from extending those holdings to the statute and Guidelines at issue here. See Sentencing Reform Act of 1984, as amended, 18 U. S. C. § 3551 *et seq.*, 28 U. S. C. § 991 *et seq.*; United States Sentencing Commission, Guidelines Manual (Nov. 2003) (USSG). Legal logic does not require that extension, for there are key differences.

First, the Federal Guidelines are not statutes. The rules they set forth are *administrative*, not statutory, in nature. Members, not of Congress, but of a Judicial Branch Commission, wrote those rules. The rules do not "establis[h] minimum and maximum penalties" for individual crimes, but guide sentencing courts, only to a degree, "fetter[ing] the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits established by Congress." *Mistretta*, 488 U. S., at 396; see

also USSG § 5G1.1; cf. *Witte*, 515 U. S., at 399 (explaining that the Guidelines range "still falls within the scope of the legislatively authorized penalty"). The rules do not create a new set of legislatively determined sentences so much as they reflect, organize, rationalize, and modify an old set of judicially determined pre-Guidelines sentences. See 28 U. S. C. § 994(a); USSG § 1A1.1, editorial note, § 3, pp. 2–4 (describing the Commission's empirical approach). Thus, the rules do not, in *Apprendi*'s words, set forth a "prescribed *statutory* maximum," 530 U. S., at 490 (emphasis added), as the law has traditionally understood that phrase.

I concede that *Blakely* defined "prescribed statutory maximum" more broadly as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U. S., at 303 (emphasis deleted). But the Court need not read this language as extending the scope of *Apprendi*. *Blakely* purports to follow, not to extend, *Apprendi*. 542 U. S., at 301. And *Blakely*, like *Apprendi*, involved sentences embodied in a statute, not in administrative rules.

More importantly, there is less justification for applying an *Apprendi*-type constitutional rule where administrative guidelines, not statutes, are at issue. The Court applies its constitutional rule to statutes in part to avoid what *Blakely* sees as a serious problem, namely, a legislature's ability to make of a particular fact an "element" of a crime or a sentencing factor, at will. See *ante*, at 230 (opinion of STEVENS, J.). That problem—that legislative temptation—is severely diminished when Commission Guidelines are at issue, for the Commission cannot create "elements" of crimes. It cannot write rules that "bind or regulate the primary conduct of the public." *Mistretta*, *supra*, at 396. Rather, it must write rules that reflect what the law has traditionally understood as sentencing factors. That is to say, the Commission cannot switch between "elements" and "sentencing factors" at will because it cannot write sub-

stantive criminal statutes at all. See 28 U. S. C. § 994(a); cf. *Blakely*, *supra*, at 301–302, 306–307.

At the same time, to extend *Blakely*'s holding to administratively written sentencing rules risks added legal confusion and uncertainty. Read literally, *Blakely*'s language would include within *Apprendi*'s strictures a host of nonstatutory sentencing determinations, including appellate court decisions delineating the limits of the legally "reasonable." (Imagine an appellate opinion that says a sentence for ordinary robbery greater than five years is unreasonably long unless a special factor, such as possession of a gun, is present.) Indeed, read literally, *Blakely*'s holding would apply to a single judge's determination of the factors that make a particular sentence disproportionate or proportionate. (Imagine a single judge setting forth, as a binding rule of law, the legal proposition about robbery sentences just mentioned.) Appellate courts' efforts to define the limits of the "reasonable" of course would fall outside *Blakely*'s scope. But they would do so *not because they escape Blakely's literal language*, but because they are not *legislative* efforts to create limits. Neither are the Guidelines *legislative* efforts. See *Mistretta*, *supra*, at 412.

Second, the sentencing statutes at issue in *Blakely* imposed absolute constraints on a judge's sentencing discretion, while the federal sentencing statutes here at issue do not. As the *Blakely* Court emphasized, the Washington statutes authorized a higher-than-standard sentence on the basis of a factual finding *only if* the fact in question was a new fact—*i. e.*, a fact that did not constitute an element of the crime of conviction or an element of any more serious or additional crime. 542 U. S., at 301–302, 306–307. A judge applying those statutes could not even consider, much less impose, an exceptional sentence, unless he found facts "'other than those which are used in computing the standard range sentence for the offense.'" *Id.*, at 299 (quoting *State* v. *Gore*, 143 Wash. 2d 288, 315–316, 21 P. 3d 262, 277 (2001)).

The federal sentencing statutes, however, offer a defendant no such fact-related assurance. As long as "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," 18 U. S. C. § 3553(b)(1) (Supp. IV), they permit a judge to depart from a Guidelines sentence based on facts that constitute elements of the crime (say, a bank robbery involving a threat to use a weapon, where the weapon in question is nerve gas). Whether departure-triggering circumstances exist in a particular case is a matter for a court, not for Congress, to decide.

Thus, as far as the federal *statutes* are concerned, the federal system, unlike the state system at issue in *Blakely*, provides a defendant with no guarantee that the jury's finding of factual elements will result in a sentence lower than the statutory maximum. Rather, the statutes put a potential federal defendant on notice that a judge conceivably might sentence him anywhere within the range provided by *statute*—regardless of the applicable Guidelines range. See *Witte*, *supra*, at 399; see also Comment, Sixth Amendment—State Sentencing Guidelines, 118 Harv. L. Rev. 333, 339–340 (2004). Hence as a practical matter, they grant a potential federal defendant less assurance of a lower Guidelines sentence than did the state statutes at issue in *Blakely*.

These differences distinguish these cases from *Apprendi* and *Blakely*. They offer a principled basis for refusing to extend *Apprendi*'s rule to these cases.

III

For these reasons, I respectfully dissent.

Syllabus

JAMA *v.* IMMIGRATION AND CUSTOMS ENFORCEMENT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03–674. Argued October 12, 2004—Decided January 12, 2005

Title 8 U. S. C. § 1231(b)(2) prescribes the procedure for selecting the country to which an alien ineligible to remain in the United States will be removed. Petitioner had his refugee status in the United States terminated for a criminal conviction. When he declined to designate a country to which he preferred to be removed, the Immigration Judge ordered him removed to Somalia, his country of birth, pursuant to § 1231(b)(2)(E)(iv). Petitioner filed a habeas petition to challenge the designation, claiming that Somalia had no functioning government and thus could not consent in advance to his removal, and that the Government was barred from removing him there absent such advance consent. The District Court agreed, but the Eighth Circuit reversed, holding that § 1231(b)(2)(E)(iv) does not require advance acceptance by the destination country.

Held: Section 1231(b)(2)(E)(iv) permits an alien to be removed to a country without the advance consent of that country's government. Pp. 338–352.

(a) Section 1231(b)(2) provides four consecutive removal commands: (1) An alien shall be removed to the country of his choice (subparagraphs (A) to (C)), unless a condition eliminating that command is satisfied; (2) otherwise he shall be removed to the country of which he is a citizen (subparagraph (D)), unless a condition eliminating that command is satisfied; (3) otherwise he shall be removed to a country with which he has a lesser connection (subparagraph (E), clauses (i) to (vi), including the country of his birth (clause (iv))); or (4) if that is "impracticable, inadvisable, or impossible," he shall be removed to another country whose government will accept him (subparagraph (E), clause (vii)). Here, the question is whether the Attorney General was precluded from removing petitioner to Somalia under subparagraph (E), clause (iv), because Somalia had not consented. Pp. 338–341.

(b) In all of subparagraph (E), an acceptance requirement appears only in clause (vii), the fourth step of the process, which the Attorney General may invoke only after finding the third step "impracticable, inadvisable, or impossible." Clauses (i) through (vi) contain not a word

Syllabus

about acceptance by the destination country. Including the word "another" in clause (vii) does not import the acceptance requirement into clauses (i)–(vi). Such a reading stretches the modifier too far, contrary to "the grammatical 'rule of the last antecedent,'" *Barnhart* v. *Thomas*, 540 U. S. 20, 26. Subparagraph (E)'s structure does not refute the inference derived from the last antecedent rule. Pp. 341–345.

(c) Nor is an acceptance requirement manifest in § 1231(b)(2)'s structure. First, the overlap between subparagraphs (D) and (E) is not so complete as to justify imposing an acceptance requirement at the third step in the name of preventing the Attorney General from "circumventing" the second step. Second, the statute expressly countenances removal to a country notwithstanding its objections. Subparagraph (C) provides that at the first step of the country-selection process, the Attorney General "may" refrain from removing an alien to the country of his choice if that country does not accept the alien; the Attorney General thus has discretion to override any lack of acceptance. Finally, the existence of an acceptance requirement at the fourth step does not imply that such a requirement must exist at the third. To infer an absolute rule of acceptance where Congress has not clearly set it forth would run counter to this Court's customary policy of deference to the President in foreign affairs, and would not be necessary to ensure appropriate consideration to conditions in the country of removal, since aliens facing persecution or other mistreatment have a number of available remedies. Pp. 345–348.

(d) Contrary to petitioner's argument, the acceptance requirement is "neither settled judicial construction nor one which [the Court] would be justified in presuming Congress, by its silence, impliedly approved," *United States* v. *Powell*, 379 U. S. 48, 55, n. 13, in its most recent reenactment of § 1231(b)(2). Pp. 349–352.

329 F. 3d 630, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 352.

Jeffrey J. Keyes argued the cause for petitioner. With him on the briefs was *Kevin M. Magnuson.*

Malcolm L. Stewart argued the cause for respondent. With him on the brief were *Acting Solicitor General Clem-*

ent, Assistant Attorney General Keisler, Deputy Solicitor General Kneedler, Donald E. Keener, and *Greg D. Mack.**

JUSTICE SCALIA delivered the opinion of the Court.

When an alien is found ineligible to remain in the United States, the process for selecting the country to which he will be removed is prescribed by 8 U. S. C. §1231(b)(2). The question in this case is whether this provision prohibits removing an alien to a country without the explicit, advance consent of that country's government.

I

Petitioner Keyse Jama was born in Somalia and remains a citizen of that nation. He was admitted to the United States as a refugee, but his refugee status was terminated in 2000 by reason of a criminal conviction. See *Jama* v. *INS*, 329 F. 3d 630, 631 (CA8 2003). The Immigration and Naturalization Service (INS) brought an action to remove petitioner from the United States for having committed a crime involving moral turpitude. *Ibid.*; see 8 U. S. C. §§1182(a)(2)(A)(i)(I), 1229a(e)(2)(A). In the administrative hearing, petitioner conceded that he was subject to removal, although he sought various forms of relief from that determination (adjustment of status, withholding of removal, and asylum relief under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment). He declined to designate a country to which he preferred to be removed. The Immigration Judge ordered petitioner removed to Somalia, his country of birth

*Briefs of *amici curiae* urging reversal were filed for International Human Rights Organizations et al. by *Jonathan L. Hafetz* and *Lawrence S. Lustberg*; and for Yusuf Ali Ali et al. by *Thomas L. Boeder* and *Nicholas P. Gellert*.

Daniel J. Popeo and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging affirmance.

and citizenship. The Board of Immigration Appeals affirmed that determination, and petitioner did not seek review in the Court of Appeals.

Instead, petitioner instituted collateral proceedings under the habeas statute, 28 U. S. C. § 2241, to challenge the designation of Somalia as his destination. He filed his petition in the United States District Court for the District of Minnesota, alleging that Somalia has no functioning government, that Somalia therefore could not consent in advance to his removal, and that the Government was barred from removing him to Somalia absent such advance consent. The District Court agreed that petitioner could not be removed to a country that had not consented in advance to receive him, *Jama* v. *INS*, Civ. File No. 01–1172 (JRT/AJB) (Mar. 31, 2002), p. 10, App. to Pet. for Cert. 51a, but a divided panel of the Court of Appeals for the Eighth Circuit reversed, holding that § 1231(b)(2) does not require acceptance by the destination country, 329 F. 3d, at 633–635. We granted certiorari. 540 U. S. 1176 (2004).

II

Title 8 U. S. C. § 1231(b)(2), which sets out the procedure by which the Attorney General[1] selected petitioner's destination after removal was ordered, was enacted as follows:

> "(2) OTHER ALIENS.—Subject to paragraph (3)—
>
> "(A) SELECTION OF COUNTRY BY ALIEN.—Except as otherwise provided in this paragraph—

[1] On March 1, 2003, the Department of Homeland Security and its Bureau of Border Security assumed responsibility for the removal program. Homeland Security Act of 2002, §§ 441(2), 442(a), 116 Stat. 2192–2194, 6 U. S. C. §§ 251(2), 252(a) (2000 ed., Supp. II). Accordingly, the discretion formerly vested in the Attorney General is now vested in the Secretary of Homeland Security. See § 551(d)(2). Because petitioner's removal proceedings, including the designation of Somalia as the country of removal, occurred before this transfer of functions, we continue to refer to the Attorney General as the relevant decisionmaker.

"(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

"(ii) the Attorney General shall remove the alien to the country the alien so designates.

"(B) LIMITATION ON DESIGNATION.—An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

"(C) DISREGARDING DESIGNATION.—The Attorney General may disregard a designation under subparagraph (A)(i) if—

"(i) the alien fails to designate a country promptly;

"(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;

"(iii) the government of the country is not willing to accept the alien into the country; or

"(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

"(D) ALTERNATIVE COUNTRY.—If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—

"(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

"(ii) is not willing to accept the alien into the country.

"(E) ADDITIONAL REMOVAL COUNTRIES.—If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

"(i) The country from which the alien was admitted to the United States.

"(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

"(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

"(iv) The country in which the alien was born.

"(v) The country that had sovereignty over the alien's birthplace when the alien was born.

"(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

"(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

"(F) REMOVAL COUNTRY WHEN UNITED STATES IS AT WAR.—When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien under this subsection because of the war, the Attorney General may remove the alien—

"(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or

"(ii) if the recognized government of the country of which the alien is a citizen or subject is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country of which the alien is a citizen or subject, or, with the consent of the govern-

> ment of the country of which the alien is a citizen or subject, to another country." Immigration and Nationality Act, § 241(b)(2), as added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 305(a)(3), 110 Stat. 3009–600.

The statute thus provides four consecutive removal commands: (1) An alien shall be removed to the country of his choice (subparagraphs (A) to (C)), unless one of the conditions eliminating that command is satisfied; (2) otherwise he shall be removed to the country of which he is a citizen (subparagraph (D)), unless one of the conditions eliminating that command is satisfied; (3) otherwise he shall be removed to one of the countries with which he has a lesser connection (clauses (i) to (vi) of subparagraph (E)); or (4) if that is "impracticable, inadvisable, or impossible," he shall be removed to "another country whose government will accept the alien into that country" (clause (vii) of subparagraph (E)). Petitioner declined to designate a country of choice, so the first step was inapplicable. Petitioner is a citizen of Somalia, which has not informed the Attorney General of its willingness to receive him (clause (i) of subparagraph (D)), so the Attorney General was not obliged to remove petitioner to Somalia under the second step. The question is whether the Attorney General was precluded from removing petitioner to Somalia under the third step (clause (iv) of subparagraph (E)) because Somalia had not given its consent.

A

We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest. In all of subparagraph (E), an acceptance requirement appears only in the terminal clause (vii), a clause that the Attorney General may invoke only after he finds that the removal options presented in the

other six are "impracticable, inadvisable, or impossible." Clauses (i) through (vi) come first—in the statute and in the process of selecting a country. And those six clauses contain not a word about acceptance by the destination country; they merely direct that "the Attorney General shall remove the alien" to any one of them.

Effects are attached to nonacceptance throughout the rest of paragraph (2), making the failure to specify any such effect in most of subparagraph (E) conspicuous—and more likely intentional. Subparagraph (C) prescribes the consequence of nonacceptance in the first step of the selection process; subparagraph (D) does the same for the second step; and clause (vii) of subparagraph (E) does the same for the fourth step.[2] With respect to the third step, however, the Attorney General is directed to move on to the fourth step only if it is "impracticable, inadvisable, or impossible to remove the alien to each country described in" the third step. Nonacceptance may surely be one of the factors considered in determining whether removal to a given country is impracticable or inadvisable, but the statute does not give it the dispositive effect petitioner wishes.

Petitioner seizes upon the word "another" in clause (vii) as a means of importing the acceptance requirement into clauses (i) through (vi). He argues that if the last resort country is "*another* country whose government will accept the alien," then the countries enumerated in clauses (i) through (vi) must *also* be "countries whose governments will accept the alien." That stretches the modifier too far.

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[2] The dissent contends that there are only three steps, with all of subparagraph (E) constituting only a single step, and that clause (vii)'s acceptance requirement therefore covers the entire subparagraph. *Post*, at 353, n. 2 (opinion of SOUTER, J.). We think not. Clause (vii) applies only after the options set out in the third step are exhausted; it is nothing if not a discrete, further step in the process. That step four is a separate clause rather than a separate subparagraph is immaterial: Step one, which is indisputably set out in *three* subparagraphs, belies the dissent's theory that steps must precisely parallel subparagraphs.

Just last Term, we rejected an argument much like petitioner's, noting that it ran contrary to "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart* v. *Thomas*, 540 U. S. 20, 26 (2003). There, a statute referred first to a claimant's "previous work" and then to "any other kind of substantial gainful work which exists in the national economy"; under the rule of the last antecedent, we declined to read the limiting clause "which exists in the national economy" into the term "previous work." *Id.*, at 26–28 (emphasis deleted; internal quotation marks omitted); accord, *FTC* v. *Mandel Brothers, Inc.*, 359 U. S. 385, 389–390 (1959). We thus did not treat "any other" as the "apparently connecting modifier" that the dissent here thinks "another" to be, *post*, at 355.[3]

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[3] Indeed, both "other" and "another" are just as likely to be words of *differentiation* as they are to be words of connection. Here the word "another" serves simply to rule out the countries already tried at the third step and referred to in the conditional prologue of clause (vii) ("If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country . . . "). It is the fact of that close earlier reference that makes it natural to say "another country" here, whereas "[a] country" is used at the outset of § 1231(b)(1)(C)(iv), in which the reference to "each country described in a previous clause of this subparagraph" comes later and hence cannot serve as an antecedent for "another." The dissent makes a mountain of this molehill, see *post*, at 356–357.

The dissent also finds profound meaning in the fact that Congress changed the text from "any country" in the 1996 legislation to "another country" in the current version. "The Court cannot be right," it says, "in reducing the 1996 amendment to this level of whimsy." *Post*, at 358. But if one lays the pre-1996 version of the statute beside the current version, he will find *numerous* changes that are attributable to nothing more than stylistic preference. To take merely one example: Clause (E)(ii) of the current law, which reads "The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States," previously read "the country in which is located the foreign port at which such alien embarked for the United

Nor does the structure of subparagraph (E) refute the inference derived from the last antecedent rule. Each clause is distinct and ends with a period, strongly suggesting that each may be understood completely without reading any further.[4] And as we have already noted, it is not necessary to turn to the acceptance language of clause (vii) to find the conditions under which the Attorney General is to abandon the third step and move to the fourth, the last resort option of any willing country. The Attorney General must do so if in his judgment it would be "impracticable, inadvisable, or impossible to remove the alien to each country described in" clauses (i) to (vi). This allows the Attorney General to take both practical and geopolitical concerns into account when selecting a destination country (and accords with the similar flexibility to pass over inappropriate countries that the statute gives the Attorney General at the other steps, see *infra*, at 348). Petitioner's reading would abridge that exercise of executive judgment, effectively deeming the removal of an alien to any country to be *per se* "impracticable, inadvisable, or impossible" absent that country's advance acceptance, even though in many cases—such as this one—it is nothing of the sort. (Removing an alien to Somalia apparently involves no more than putting the alien on one of the regularly

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States or for foreign contiguous territory." 8 U. S. C. § 1253(a)(2) (1994 ed.). The dissent must explain why these changes were insignificant whereas the change from "any country" to "another country" was a momentous limitation upon executive authority.

[4] By contrast, in the cases on which the dissent relies to rebut the last antecedent inference, see *post*, at 354–356, the structure cut the other way: The modifying clause appeared not in a structurally discrete statutory provision, but at the end of a single, integrated list—for example, "'receives, possesses, or transports in commerce or affecting commerce.'" *United States* v. *Bass*, 404 U. S. 336, 337, 339 (1971); see also *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, 218 (1920); *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 213 (1905). We do not dispute that a word is known by its fellows, but here the structure refutes the premise of fellowship.

scheduled flights from Dubai or Nairobi, and has been accomplished a number of times since petitioner's removal proceeding began. App. 36–40 (declaration of detention enforcement officer Eric O'Denius).) Even without advance *consultation*, a country with a functioning government may well accept a removed alien when he is presented at the border or a port of entry; the absence of advance *consent* is hardly synonymous with impracticability or impossibility.[5]

B

Petitioner contends that even if no acceptance requirement is explicit in the text, one is manifest in the entire structure of § 1231(b)(2). The Attorney General may not remove an alien to a country under subparagraph (A) or (D) without that country's consent, petitioner reasons, so he must be barred from circumventing that limitation by removing the same alien to the same country under subparagraph (E). The dissent rests its argument only on the existence of an acceptance requirement in step two (subparagraph (D)) and not in step one (subparagraphs (A) through (C)).[6]

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[5] The Government argued below that even if clauses (i) through (vi) of subparagraph (E) require some form of consent, the destination country's acceptance of the alien at the port of entry suffices. Brief for Respondent-Appellant in No. 02–2324 (CA8), pp. 43–46; *Jama* v. *INS*, Civ. File No. 01–1172 (JRT/AJB) (D. Minn., Mar. 31, 2002), p. 14, App. to Pet. for Cert. 54a. Because clauses (i) through (vi) contain no acceptance requirement, we need not pass on petitioner's contention that when § 1231(b)(2) requires acceptance, only *advance* acceptance will do.

[6] The dissent asserts that we misdescribe petitioner's argument when we say it rests on both steps one and two. *Post*, at 364, and n. 10. We note that petitioner heads the relevant argument "The Plain Language Of The Statute Requires Acceptance *At Every Step*," Brief for Petitioner 23 (emphasis added), and concludes his description of the country-selection process with the assertion that "[t]he outer limit of the Attorney General's authority, . . . which circumscribes the selection of *any country*, is that the government of the country of removal must be willing to accept the alien," *id.*, at 18 (emphasis added); see also *id.*, at 19–20.

We note initially a point that applies to both petitioner's and the dissent's positions: The "circumvention" argument requires that the country the Attorney General selects at step three—here, the country of birth under clause (iv)—also be the country of citizenship that was disqualified at step two for failure to accept the alien. That will sometimes be true, yet the reason step three exists at all is that it will not *always* be true. (Indeed, in petitioner's case, several of the clauses of subparagraph (E) describe Kenya, not Somalia.) Despite this imperfect overlap, petitioner and the dissent seek to impose an acceptance requirement on *all* removals under step three, in the name of preventing the Attorney General from "circumventing" step two in the cases where a step-three country is also the country of citizenship.

The more fundamental defect in petitioner's argument, which appeals to a presumed uniformity of acceptance requirement throughout § 1231(b)(2), is that its premise is false. It is simply not true that the Attorney General may not remove an alien to a country under subparagraph (A) or (D) without that country's consent. Subparagraph (C) specifies that the Attorney General "may disregard" the alien's subparagraph (A) designation if the designated country's government proves unwilling to accept the alien or fails to respond within 30 days. The word "may" customarily connotes discretion. See, *e. g.*, *Haig* v. *Agee*, 453 U. S. 280, 294, n. 26 (1981). That connotation is particularly apt where, as here, "may" is used in contraposition to the word "shall": The Attorney General "shall remove" an alien to the designated country, except that the Attorney General "may" disregard the designation if any one of four potentially countervailing circumstances arises. And examining those four circumstances reinforces the inappropriateness of reading "may" to mean "shall" in subparagraph (C): Would Congress really have wanted to preclude the Attorney General from removing an alien to his country of choice, merely because that country took 31 days rather than 30 to manifest its ac-

ceptance? (Subparagraph (C), unlike subparagraph (D), offers no "reasonable time" exception to the 30-day rule.) Petitioner insists that a lack of advance acceptance is an absolute bar to removal, but offers no plausible way of squaring that insistence with the text of subparagraph (C).[7]

Nor does the existence of an acceptance requirement at the fourth and final step create any structural inference that such a requirement must exist at the third. It would be a stretch to conclude that merely because Congress expressly directed the Attorney General to obtain consent when removing an alien to a country with which the alien lacks the ties of citizenship, nativity, previous presence, and so on, Congress must also have *implicitly* required him to obtain advance acceptance from countries with which the alien *does* have such ties. Moreover, if the Attorney General is unable to secure an alien's removal at the third step, all that is left is the last resort provision allowing removal to a country with which the alien has little or no connection—if a country can be found that will take him. If none exists, the alien is left in the same removable-but-unremovable limbo as the aliens in *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), and *Clark* v. *Martinez*, *post*, p. 371, and under the rule announced in those cases must presumptively be released into American

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[7] The same incompatibility may exist with regard to subparagraph (D), which prescribes that the Attorney General "shall remove the alien" to his country of citizenship "unless" that country's government declines to accept the alien or fails to manifest its acceptance within a reasonable time. The Government urges that the two exceptions preserve discretion for the Attorney General: If one of those conditions exists, the Attorney General is no longer required to remove the alien to that country, but he *may* still do so. We need not resolve whether subparagraph (D) affords this residual level of discretion; subparagraph (C) is more than enough to demonstrate that an acceptance requirement does not pervade the selection process in the way petitioner claims, and other factors suffice to refute the dissent's more limited contention. Rejection of the Government's argument is essential, however, to the dissent's position, see *post*, at 365–368—and the proper resolution is far from clear.

society after six months. If this is the result that obtains when the country-selection process fails, there is every reason to refrain from reading restrictions into that process that do not clearly appear—particularly restrictions upon the third step, which will often afford the Attorney General his last realistic option for removal.

To infer an absolute rule of acceptance where Congress has not clearly set it forth would run counter to our customary policy of deference to the President in matters of foreign affairs. Removal decisions, including the selection of a removed alien's destination, "may implicate our relations with foreign powers" and require consideration of "changing political and economic circumstances." *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976). Congress has already provided a way for the Attorney General to avoid removals that are likely to ruffle diplomatic feathers, or simply to prove futile. At each step in the selection process, he is *empowered* to skip over a country that resists accepting the alien, or a country that has declined to provide assurances that its border guards will allow the alien entry.

Nor is it necessary to infer an acceptance requirement in order to ensure that the Attorney General will give appropriate consideration to conditions in the country of removal. If aliens would face persecution or other mistreatment in the country designated under § 1231(b)(2), they have a number of available remedies: asylum, § 1158(b)(1); withholding of removal, § 1231(b)(3)(A); relief under an international agreement prohibiting torture, see 8 CFR §§ 208.16(c)(4), 208.17(a) (2004); and temporary protected status, 8 U. S. C. § 1254a(a)(1). These individualized determinations strike a better balance between securing the removal of inadmissible aliens and ensuring their humane treatment than does petitioner's suggestion that silence from Mogadishu inevitably portends future mistreatment and justifies declining to remove *anyone* to Somalia.

C

Petitioner points to what he describes as the "settled construction" of § 1231(b)(2), and asserts that Congress, in its most recent reenactment of the provision, should be deemed to have incorporated that construction into law. We think not. Neither of the two requirements for congressional ratification is met here: Congress did not simply reenact § 1231(b)(2) without change, nor was the supposed judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it.

Removal is a new procedure created in 1996 through the fusion of two previously distinct expulsion proceedings, "deportation" and "exclusion." IIRIRA, § 304(a)(3), 110 Stat. 3009–589, 8 U. S. C. § 1229a. Our immigration laws historically distinguished between aliens who have "entered" the United States and aliens still seeking to enter (whether or not they are physically on American soil). See *Leng May Ma* v. *Barber*, 357 U. S. 185, 187 (1958). "The distinction was carefully preserved in Title II" of the Immigration and Nationality Act (INA): expelling an alien who had already entered required a *deportation* proceeding, whereas expelling an alien still seeking admission could be achieved through the more summary exclusion proceeding. *Ibid.*; see *Landon* v. *Plasencia*, 459 U. S. 21, 25–27 (1982) (cataloging differences between the two proceedings). Aliens who, like petitioner, were allowed into the United States as refugees were subject to exclusion proceedings rather than deportation proceedings when their refugee status was revoked. 8 CFR § 207.8 (1995).[8]

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[8] Petitioner's application for admission was deemed to have been made after his criminal conviction, because he had not applied previously. See 8 U. S. C. § 1159(a)(1) (1994 ed.) (a refugee must appear for "inspection and examination for admission to the United States as an immigrant in accordance with [§ 1227, the former exclusion provision]" one year after entry). The district director conducted petitioner's examination for admission and found him inadmissible by reason of his conviction. Record

The cases on which petitioner relies pertained to the INA's *deportation* provision, the former 8 U. S. C. § 1253 (1952 ed.). *United States ex rel. Tom Man* v. *Murff*, 264 F. 2d 926 (CA2 1959); *Rogers* v. *Lu*, 262 F. 2d 471 (CADC 1958) *(per curiam)*.[9] In the two cited cases, the Courts of Appeals barred deportation of aliens to the People's Republic of China, a nation with which the United States at the time had no diplomatic relations, without that nation's prior consent. *Tom Man*, *supra*, at 928 (reading the acceptance requirement in clause (vii) to cover clauses (i) to (vi) as well); *Rogers*, *supra*, at 471.[10] During the same period, however, courts—including the Court of Appeals that decided *Tom Man*—were *refusing* to read an acceptance requirement into the exclusion provision, the former 8 U. S. C. § 1227 (1952 ed.). *E. g.*, *Menon* v. *Esperdy*, 413 F. 2d 644, 654 (CA2 1969). Likewise, when Congress amended the exclusion provision to expand the list of possible destinations—adding three new categories and a fourth, last resort provision virtually identical to the last resort provision in current § 1231(b)(2)(E)(vii), see 8 U. S. C. § 1227(a)(2) (1982 ed.)—courts were generally skepti-

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97, 99 (Exh. F). This finding, under the pre-1996 law, would have subjected petitioner to expulsion "in accordance with" the exclusion provision, not the deportation provision.

[9] *Rogers* v. *Lu* in fact involved the existence of an acceptance requirement at step *two*, not step three. See *Lu* v. *Rogers*, 164 F. Supp. 320, 321 (DC 1958).

[10] The dissent asserts that the Board of Immigration Appeals adhered to a similar position. *Post*, at 359. With rare exceptions, the BIA follows the law of the circuit in which an individual case arises, see *Matter of K—S—*, 20 I. & N. Dec. 715, 718 (1993); *Matter of Anselmo*, 20 I. & N. Dec. 25, 30–32 (1989). Thus, in a case arising in the Second Circuit, the BIA adhered (in dictum) to that court's decision in *Tom Man*. See *Matter of Linnas*, 19 I. & N. Dec. 302, 306–307 (1985). But in a case decided after *Tom Man* and *Rogers* but not controlled by those decisions, the BIA held to the contrary: "When designating a country in step three as a place of deportation, there is *no requirement* that preliminary inquiry be addressed to the country to which deportation is ordered . . . ." *Matter of Niesel*, 10 I. & N. Dec. 57, 59 (1962) (emphasis added).

cal of efforts to read the acceptance requirement back into the other clauses. *E. g., Walai* v. *INS*, 552 F. Supp. 998, 1000 (SDNY 1982); *Amanullah* v. *Cobb*, 862 F. 2d 362, 369 (CA1 1988) (Aldrich, J., concurring). But see *id.*, at 365, and n. 4 (opinion of Pettine, J.).

In other words, IIRIRA forged the new removal procedure out of two provisions, only one of which had been construed as petitioner wishes.[11] And even the supposed judicial consensus with respect to that one provision boils down to the decisions of two Courts of Appeals—one of which was only a two-sentence *per curiam* that considered step two, not step three. *Rogers*, *supra*, at 471; see n. 9, *supra*.[12] In the context of new § 1231(b)(2), the acceptance requirement is "neither a settled judicial construction nor one which we would be justified in presuming Congress, by its silence, impliedly approved." *United States* v. *Powell*, 379 U. S. 48, 55, n. 13 (1964) (citation omitted). Even notwithstanding the

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[11] The dissent's assertion, *post*, at 361–362, that § 1231(b)(2) descends solely from the former deportation provision is, in the relevant respect, erroneous. To be sure, the former exclusion provision has its own exclusive descendant in § 1231(b)(1), but that applies only to aliens placed in removal proceedings immediately upon their arrival at the border, see §§ 1231(b)(1)(A), (c)(1), not to formerly excludable aliens who, like petitioner, were paroled or otherwise allowed into the country. Whereas previously some aliens who had been allowed into the country were excluded and some deported, see §§ 1227(a)(1), 1253(a) (1994 ed.), now all are *removed* and their destination chosen under § 1231(b)(2), not (b)(1). Section 1231(b)(2) is thus a descendant of the exclusion provision as well as the deportation provision, and cases decided under the former represent the relevant prior law no less than cases decided under the latter.

The dissent repeatedly contends that Congress intended to make no substantive change to the prior law when it enacted § 1231(b)(2). *E. g.*, *post*, at 361–362. But on the dissent's view the 1996 amendment worked rather a large change: Refugees like petitioner, who previously could be expelled without acceptance (under former § 1227), now cannot. See n. 8, *supra*.

[12] The additional dicta cited by the dissent, *post*, at 359, do not lend any additional weight to the argument that Congress ratified a settled judicial construction. Dictum settles nothing, even in the court that utters it.

contradictory interpretation of the BIA, see n. 10, *supra*, petitioner's Circuit authority is too flimsy to justify presuming that Congress endorsed it when the text and structure of the statute are to the contrary.[13]

* * *

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SOUTER, joined by JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER, dissenting.

Title 8 U. S. C. § 1231(b) prescribes possible destinations for aliens removable from the United States. Paragraph (1) of that subsection governs aliens found excludable from the United States in the first place, whereas paragraph (2), which is at issue in this case, governs those once admitted for residence but since ordered to be deported (for criminal conduct while here, for example).[1] As to the latter, paragraph (2) sets out three options or successive steps for picking the recipient country. At step one, the alien himself designates the country, § 1231(b)(2)(A), subject to conditions set

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[13] In his brief on the merits, petitioner raises the additional contention—not presented to, or decided by, the Court of Appeals—that removal to Somalia is impermissible at any step of § 1231(b)(2) because the lack of a functioning central government means that Somalia is not a "country" as the statute uses the term. The question on which we granted certiorari in this case, as phrased by petitioner himself, was as follows: "Whether the Attorney General can remove an alien to one of the countries designated in 8 U. S. C. § 1231(b)(2)(E) without obtaining that country's acceptance of the alien prior to removal." Pet. for Cert. i. That question does not fairly include whether Somalia is a country any more than it fairly includes whether petitioner is an alien or is properly removable; we will not decide such issues today. See this Court's Rule 14.1(a); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 42, n. 5 (1998).

[1] Paragraph (2) is quoted in the Court's opinion. *Ante*, at 338–341. Paragraph (1) is quoted in an appendix to this dissent. *Infra*, at 369–370.

out in subparagraphs (B) and (C). If no removal to a step-one choice occurs, the Secretary of Homeland Security at step two designates the country of which the alien "is a subject, national, or citizen" as the place to send him. § 1231(b)(2)(D). If no such removal occurs, the Secretary at step three names a country with which the alien has some prior connection, or (as a last resort) one with which he has no connection at all. § 1231(b)(2)(E).[2]

The provision for step three describes six countries with various connections to an alien ("[t]he country in which the alien was born," for example, § 1231(b)(2)(E)(iv)), as well as the choice of last resort, "another country whose government will accept the alien into that country," § 1231(b)(2)(E)(vii). The question is whether not only the seventh, last-resort country but also the prior six are subject to the condition

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[2] The Court contends that the statute actually contains four steps rather than three, with the third consisting of the first six clauses of subparagraph (E) and the fourth being the seventh clause of that same subparagraph. *Ante*, at 341. But while the seventh clause is in a sense separated from the first six, it seems odd to view them as entirely distinct since Congress saw fit not only to put them in the same subparagraph, but also to limit the scope of the "impracticable, inadvisable, or impossible" phrase in clause (vii) to the countries "described in a previous clause of this subparagraph." 8 U. S. C. § 1231(b)(2)(E)(vii). This difficulty with the Court's reading may explain why no other court has taken a four-step view of the statute and why even the Government describes the law as "'set[ting] forth a progressive, three-step process for determining a removable alien's destination country.'" Brief for Respondent 5 (quoting *Jama* v. *INS*, 329 F. 3d 630, 633 (CA8 2003)). The Court apparently takes the four-step view so that it can go on to say that three of the four steps, but not step three, expressly address "the consequence of nonacceptance." *Ante*, at 342. (Since it separates clause (vii) from clauses (i)–(vi), the four-step view also makes it easier to undermine Jama's argument that the acceptance requirement in clauses (i)–(vi) is grounded in the text of clause (vii).)

The Court's response that "[s]tep one, which is indisputably set out in three subparagraphs, belies the dissent's theory that steps must precisely parallel subparagraphs," *ante*, at 342, n. 2 (emphasis deleted), misses the mark because that is not in fact my contention.

that the "government will accept the alien into that country." In my judgment, the acceptance requirement applies to all seven; the Court's contrary conclusion is at war with the text, structure, history, and legislative history of the statute, and I respectfully dissent.

I

The Court remarks that "[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Ante*, at 341. Indeed we do not, but the question in this case is whether Congress really has left out an acceptance requirement covering the entire "adopted text," that is, the provision governing all seven choices at step three. Jama says that the text contains just that requirement, in the seventh and final clause of § 1231(b)(2)(E). As noted, that clause provides a last possible destination for aliens who cannot (or, in the Government's view, should not) be removed under subparagraphs (A) through (D) or the first six clauses of subparagraph (E); it does so by authorizing removal to "another country whose government will accept the alien," § 1231(b)(2)(E)(vii).

Jama contends that the description of "another" willing country applies an acceptance requirement to clauses (i) through (vi) of the same subparagraph, (E). If Congress had not intended this, it would have written clause (vii) differently, as by saying, for example, "a country whose government will accept the alien" or "any country whose government will accept the alien" or "another country, if that country will accept the alien." Congress, in other words, had some simple drafting alternatives that would not have indicated any intent to attach an acceptance requirement to clauses (i) through (vi), but instead used language naturally read as alluding to a common characteristic of all the countries in the series, a willingness to take the alien. Jama would therefore have us draw the straightforward conclusion that all step-three designations are subject to acceptance by the country selected, just as we have reasoned before when

construing comparable statutory language. *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, 218 (1920) ("The prohibitions extend to the use of food products for making 'beer, wine, or other intoxicating malt or vinous liquor for beverage purposes.' . . . It is elementary that all of the words used in a legislative act are to be given force and meaning, and of course the qualifying words 'other intoxicating' in this act cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect. The Government insists that the intention was to include beer and wine whether intoxicating or not. If so the use of this phraseology was quite superfluous, and it would have been enough to have written the act without the qualifying words" (citation omitted)).

The Court dodges the thrust of the congressional language by invoking the last antecedent rule as a grammatical reason for confining the requirement of a receiving country's willingness strictly to the seventh third-step option, where it is expressly set out. Under the last antecedent rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart* v. *Thomas*, 540 U. S. 20, 26 (2003), quoted *ante*, at 343. If the rule applied here, it would mean that the phrase "whose government will accept . . . " modified only the last choice "country" in clause (vii), to the exclusion of each "country" mentioned in the immediately preceding six clauses, notwithstanding the apparently connecting modifier, "another."

But the last antecedent rule fails to confine the willing-government reference to clause (vii). The rule governs interpretation only "ordinarily," and it "can assuredly be overcome by other indicia of meaning . . . ." *Barnhart*, *supra*, at 26. Over the years, such indicia have counseled us against invoking the rule (often unanimously) at least as many times as we have relied on it. See *Nobelman* v. *Amer-*

ican Savings Bank, 508 U. S. 324, 330–331 (1993); *United States* v. *Bass*, 404 U. S. 336, 340, n. 6 (1971); *Standard Brewery*, *supra*, at 218 (citing *United States* v. *United Verde Copper Co.*, 196 U. S. 207 (1905)). And here, the other indicia of meaning point with one accord to applying the acceptance requirement to each third-step option.

The first of these indicia is the contrast between the text of clause (vii), which is the last resort for "deportation," and the wording of the corresponding provision in the adjacent and cognate paragraph of the same subsection that deals with "exclusion." As the Court explains, *ante*, at 349, the 1996 amendments addressing removal of aliens gathered into one statute prior provisions dealing with the two different varieties of removal: what the earlier law called exclusion, that is, the removal of an excludable alien "with respect to whom [removal] proceedings . . . were initiated at the time of such alien's arrival," § 1231(b)(1), and what the earlier law called deportation, that is, the removal of all other aliens. Exclusion is the sole subject of paragraph (1) of the current statute, while deportation is the sole subject of paragraph (2), the one at issue here. See *supra*, at 352.

The separate attention to the two classes of removable aliens includes separate provisions for selecting the country to which an alien may be removed. Paragraph (1) sets out several options for excludable aliens, much as paragraph (2) does for those who are deportable. And just like the final clause of the final subparagraph of paragraph (2) (clause (vii)), the final clause of the final subparagraph of paragraph (1) provides a last resort that is available when removal of an excludable alien to any of the previously described countries "is impracticable, inadvisable, or impossible." § 1231(b)(1)(C)(iv). The two last-resort provisions differ in one important way, however. The provision for deportable aliens in paragraph (2) speaks of "another country whose government will accept the alien into that country," § 1231(b)(2)(E)(vii), while the one for excludable aliens in

paragraph (1) reads, "[a] country with a government that will accept the alien into the country's territory," § 1231(b)(1)(C)(iv). Congress thus used two different words ("another" and "a") in parallel provisions of two immediately adjacent and otherwise similar paragraphs. Whereas "another country" with a willing government is readily read to imply that the country described is like one or more other countries already identified, "a country" with a willing government carries no such implication.

Although this textual difference between simultaneously enacted provisions that address the same subject makes no sense unless Congress meant different things by its different usage, the Court treats the "a country" and "another country" provisions as if they were exactly the same. In doing so, it "runs afoul of the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 711, n. 9 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46:06, p. 194 (6th ed. 2000)); accord, *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'"); *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship"). Jama's contrasting interpretation, which I would adopt, is consistent with Congress's distinct choices of words.[3]

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[3] The Court responds to this textual difference by asserting that "the word 'another' serves simply to rule out the countries already tried at the third step . . . ." *Ante*, at 343, n. 3. But the word "another" is not needed to rule out other countries; they are already ruled out by the phrase in clause (vii), "[i]f impracticable, inadvisable, or impossible to remove the

Our long-held view that distinct words have distinct meanings is, if anything, all the stronger here because the choice to use "another" was unmistakably deliberate. The prior statute governing deportable aliens like Jama described the country of last resort with a neutral modifier, providing that if no other suitable destination could be found then deportation had to be "to any country which is willing to accept such alien into its territory." Immigration and Nationality Act of 1952, § 243(a)(7), 66 Stat. 213 (codified from 1952 to 1996 at 8 U. S. C. § 1253(a)); see also Internal Security Act of 1950, § 23, 64 Stat. 1010 (nearly identical text). But in 1996 Congress went to the trouble of changing "any" to "another," legislative action that can neither be dismissed as inadvertent nor discounted as a waste of time and effort in merely exchanging two interchangeable modifiers.

The Court cannot be right in reducing the 1996 amendment to this level of whimsy. And if there were any doubt about what Congress was getting at when it changed "any country" to "another country," legislative history and prior case law combine to show what Congress had in mind. At least one House of Congress intended various 1996 amendments (including "any country" to "another country") to make no substantive change in the law. H. R. Conf. Rep. No. 104–828, p. 216 (1996); H. R. Rep. No. 104–469, pt. 1, p. 234 (1995) (Judiciary Committee Report) (both describing the relevant section as merely "restat[ing]" the earlier provision). Accordingly, the change from "any" to "another" makes most sense as a way to bring the text more obviously into line with an understanding on the part of Congress that

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alien to each country described in a previous clause of this subparagraph." § 1231(b)(2)(E)(vii). Even had Congress used "a country" or "any country" instead of "another country," that is, the "countries already tried at the third step," *ante*, at 343, n. 3, would still be "rule[d] out," *ibid.*, by the "impracticable, inadvisable, or impossible" language.

an acceptance requirement applied to all options for deporting all aliens at step three.[4]

This is also the understanding that fits with what we know about the view of the law outside of Congress. In an early decision by Judge Learned Hand, the Second Circuit squarely held that the pre-1996 designations of receiving countries were all subject to the country's acceptance. *United States ex rel. Tom Man* v. *Murff*, 264 F. 2d 926 (CA2 1959). Other Circuit opinions took the same position in dicta. *E. g.*, *Amanullah* v. *Cobb*, 862 F. 2d 362, 365–366 (CA1 1988) (opinion of Pettine, J.); *id.*, at 369 (Aldrich, J., concurring) (both citing *Tom Man*, *supra*); *Chi Sheng Liu* v. *Holton*, 297 F. 2d 740, 743 (CA9 1961) (citing *Tom Man* and describing the predecessor to § 1231(b)(2) as "provid[ing] that an alien cannot be deported to any country unless its government is willing to accept him into its territory" (internal quotation marks omitted)). Nor was the consensus confined to the courts, for the Board of Immigration Appeals read the predecessor to subparagraphs (E)(i)–(vi) as having an acceptance requirement. *Matter of Linnas*, 19 I. & N. Dec. 302, 307 (1985) ("[T]he language of that section expressly requires, or has been construed to require, that the 'government' of a country selected under any of the three steps must indicate it is willing to accept a deported alien into its 'territory' "); but cf. *Matter of Niesel*, 10 I. & N. Dec. 57, 59 (BIA 1962).[5] And even within the Government, this

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[4] The point is simply that Congress changed the text to make it reflect more clearly what Congress understood the law to be already, an understanding I explain in the text following this note. There is no suggestion that the change created "a momentous limitation upon executive authority," *ante*, at 344, n. 3; quite the contrary.

[5] The Court contends that in *Linnas* the Board of Immigration Appeals was simply "adher[ing]" to the relevant circuit precedent. *Ante*, at 350, n. 10. But the Board never stated that it was merely following circuit precedent, a notable omission when contrasted with the BIA decisions the Court cites, in which discussion of the Board's policy of honoring circuit

understanding seems to have survived right up to the time this case began to draw attention, for just last year the Justice Department's Office of Legal Counsel rendered an opinion (albeit one not directly addressing § 1231(b)(2)) stating that an acceptance requirement attaches to clauses (i) through (vi). Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service 27, n. 11 (Feb. 20, 2003), available at http://www.usdoj.gov/olc/INSDetention.htm (as visited Dec. 7, 2004, and available in Clerk of Court's case file).

The Government, like today's Court, is fighting uphill when it tries to show that these authorities failed to express the consensus view of the law at the time Congress rearranged the statutes, and neither Government nor Court cites a single judicial ruling, prior to the Eighth Circuit's decision here, that held or stated in dicta or even implied that the acceptance requirement did not apply throughout the third step. The District Court in this case, echoing the Magistrate Judge, stressed this very point, saying that "in fifty pages of briefing, the government has not cited a single case in which a federal court has sanctioned the removal of a legally admitted alien to a country that has not agreed to accept him." App. to Pet. for Cert. 52a (emphasis and internal quotation marks omitted).[6] The Court similarly cites "not . . . a single case." The fair conclusion is that when

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precedent was explicit. *Matter of K— S—*, 20 I. & N. Dec. 715, 718–720 (1993); *Matter of Anselmo*, 20 I. & N. Dec. 25, 31 (1989).

[6] The absence of contrary case law also knocks out the sole authority the Court relies on to reject Jama's argument that the prior law enjoyed a settled construction requiring consent. *Ante*, at 351. The Court cites *United States* v. *Powell*, 379 U. S. 48 (1964), which denied that there was any settled construction precisely because there was a case taking a contrary viewpoint, *id.*, at 55, n. 13 (citing *In re Keegan*, 18 F. Supp. 746 (SDNY 1937)). *Powell* is thus beside the point here given the unanimity of the courts that construed the former deportation provision to require acceptance.

Congress amended the statute, it understood the law to require a country's consent and chose language suited to that understanding.

The Court's attempt to undercut this evidence founders on a mistake of fact. The Court describes the 1996 amendment as creating the current removal scheme "through the fusion of two previously distinct expulsion proceedings, 'deportation' and 'exclusion.'" *Ante*, at 349. According to the Court, this fusion neutralizes Jama's contention that the settled understanding of the prior law, expressed in consistent judicial treatment, was meant to be carried forward into subparagraphs (E)(i)–(vi). Because the current statute was "forged . . . out of two provisions [one on exclusion and one on deportation], only one of which [on deportation] had been construed as petitioner wishes," *ante*, at 351, the Court says it is unsound to argue that Congress meant to preserve an acceptance requirement when the statute merged the old exclusion and deportation laws.

The Court goes wrong here, and we have already seen how. It is true that the 1996 law uses the word "removal" to cover both exclusion and deportation, *e. g.*, *Calcano-Martinez* v. *INS*, 533 U. S. 348, 350, n. 1 (2001), and places the former exclusion and deportation provisions in a single section (indeed, a single subsection) of the U. S. Code. The statutory provision now before us, however, in no way resulted from a textual merger of two former provisions. As noted, the language of the prior exclusion provision appears (with very few changes from its predecessor) in one paragraph, compare § 1231(b)(1)[7] with 8 U. S. C. § 1227(a) (1994 ed.), while the language on deportation appears in a separate paragraph, § 1231(b)(2), which tracks almost exactly the text of the former deportation provision, compare § 1231(b)(2) with 8 U. S. C. § 1253(a) (1994 ed.). The provision to be construed, then, is not a "fusion" of old fragments on different

[7] This is the paragraph that contains a last-resort provision using "[a] country" instead of "another country."

subjects, but language unchanged in any way helpful to the Government from the text of the prior law, with its settled judicial and administrative construction.

The Court responds that § 1231(b)(2) must descend from the prior exclusion provision because the old exclusion provision would have been used to send an alien in Jama's situation out of the country, whereas now § 1231(b)(2) is used. *Ante*, at 351, n. 11. But this is beside the point. The issue before us concerns the process (laid out in § 1231(b)(2)) by which certain aliens are sent out of the country. We are considering what that process requires. The Court's observation, by contrast, involves the separate issue of who is covered by that process. Put simply, whether or not changes to other sections of the Act or to the implementing regulations enlarged the class of aliens subject to the process is irrelevant to the question of what the process is, that is, the question of what § 1231(b)(2) provides.

In sum, we are considering text derived from earlier law understood to require a receiving country's acceptance of any alien deported to it at step three. The only significant textual change helps to express that understanding of the law's requirements, and two House Reports stated that the amending legislation was not meant to change substantive law. Text, statutory history, and legislative history support reading the clause (vii) language, "another country whose government will accept the alien," as providing that any "country" mentioned in the six preceding clauses, (i) through (vi), must also be willing to accept the alien before deportation thence may be ordered.

II

I mentioned how reference to § 1231(b)(1), governing exclusion, illuminates the choice to speak of "another country" in § 1231(b)(2). A different cross-reference within the statute confirms the reading that all step-three choices are subject to an acceptance requirement. Jama argues that subparagraph (D), laying out step two, contains an acceptance

requirement that in most cases the Government will be able to circumvent under the Court's interpretation of subparagraphs (E)(i)–(vi) as lacking any such requirement.[8] The point is well taken.

Subparagraph (D) provides that if an alien is not removed to the country designated at step one, the Secretary "shall [at step two] remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country" is unwilling to accept the alien or fails to inform the Secretary within a certain time that it is willing. § 1231(b)(2)(D). On the Court's reading of subparagraph (E), however, anytime an alien's country of citizenship (the designee at step two) is the same as his country of birth (a possible designee at step three, under subparagraph (E)(iv)), the country's refusal to accept the alien, precluding removal at step two, will be made irrelevant as the Government goes to step three and removes to that country under subparagraph (E)(iv). This route to circumvention will likewise be open to the Government whenever, as will almost always be the case, an alien's country of citizenship is also described in one of the other clauses of subparagraph (E). If an alien, for example, resided in his country of citizenship at any time prior to his arrival in the United States (as is undoubtedly true in virtually every case), the Government could get around the acceptance requirement of subparagraph (D) by removing him at step three: under clause (i) if he came directly from his country of citizenship or clause (iii) if he came by way of another country or countries.[9]

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[8] The Government contends that subparagraph (D) actually contains no acceptance requirement, but as discussed below this argument is untenable.

[9] The Court misses the point in saying that "it will not always be true" that "the country the [Secretary] selects at step three . . . also [is] the country of citizenship . . . ." *Ante*, at 346 (emphasis deleted). The point is not that under the Court's reading the Government will necessarily select a country at step three that allows it to circumvent the step-two

The Court's attempt to deflect this objection, like its attempt to deflect the pre-1996 consensus, runs into a mistake. As the Court inaccurately characterizes Jama's argument, he contends that reading a general acceptance requirement out of subparagraph (E) would permit circumvention of the acceptance requirement in "subparagraph (A) or (D)." *Ante*, at 346. The Court then goes on to answer the argument as thus restated by (correctly) pointing out that there is no unconditional acceptance requirement at every stage before step three; this is so because subparagraph (A) imposes no absolute acceptance requirement at step one. Instead, subparagraph (C) provides that the Government "may," but need not, refrain from deporting an alien to his country designated at step one if that country is unwilling to accept him. *Ante*, at 346–347.

But the acceptance provision governing subparagraph (A) (step one) is beside the point. Jama's argument rests not on some common feature of "subparagraph[s] (A) [and] (D)," *ante*, at 346, but on the text of subparagraph (D), that is, on step two alone. He argues that the Government's power under that step is subject to an acceptance requirement, which the Government's reading would allow it to skirt.[10]

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acceptance requirement, but rather that it will always, or almost always, have the option to do so.

Here again, as with the Court's four-step interpretation of the statute, see *supra*, at 353, n. 2, not even the Government can subscribe to the Court's view, instead acknowledging forthrightly that in all or almost all cases, the alien's country of nationality will also be described in one of the clauses of subparagraph (E). Tr. of Oral Arg. 47 ("[T]he state of nationality is . . . always or virtually always going to be covered [in subparagraph (E)] because [the clauses of that subparagraph] include country of birth, country from which the alien departed to enter the United States, country in which he previously resided, country . . . that exercises sovereignty over the country in which he was born").

[10] This is the argument in Jama's brief: "This proposed interpretation of the removal statute, by which the [Government] can avoid the explicit acceptance requirement of step two by removing the alien to the same

As for the argument that Jama actually makes about the step-two acceptance requirement, the Court says only that it "need not resolve whether subparagraph (D)" contains such a requirement. *Ante*, at 347, n. 7. But that is precisely what we do need to resolve, for if step two does contain an acceptance requirement, then the Court's interpretation allows the Government to evade it in nearly if not actually all cases, simply by proceeding to step three. All the Court can muster in response to Jama's actual argument (an argument it ascribes to me) is the statement that "other [unnamed] factors suffice to refute the dissent's more limited contention." *Ibid.*

The Government at least joins issue with Jama, when it claims step two has no acceptance requirement to evade.

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country without acceptance in step three, . . . would make the second step of the statute, which requires acceptance by the government of which the alien is a subject, national, or citizen, superfluous and thus would violate a basic principle of statutory construction. As the district court observed, 'a removable alien will almost invariably be a "subject, national, or citizen" of the country in which he was born. As a result, the acceptance requirement of § 1231(b)(2)(D) is easily circumvented by § 1231(b)(2)(E)(iv) if the latter clause is read not to require acceptance.'" Brief for Petitioner 27 (citation omitted); see also *id.*, at 28 ("The Ninth Circuit relied in part on this [circumvention] argument in ruling that the acceptance requirement also applies in step three. It noted that if respondent's interpretation were upheld, then even though a government has actually refused acceptance of a removable person in step two, the person could be airdropped surreptitiously into that same country if it met the requirements of one of the subparts [of step three]" (second alteration in original; internal quotation marks omitted)).

The Court responds by pointing to the heading for a different section of Jama's brief and to isolated statements that appear in still other sections. *Ante*, at 345, n. 6. But the most the Court could say based on these references is that Jama advances alternative challenges: first that acceptance is required at every step (in which case it should be required in subparagraphs (E)(i)–(vi)) and second that acceptance is at least required at step two, in which case the Government's interpretation allows the step-two acceptance requirement to be circumvented. Parties making alternative arguments do not forfeit either one, yet the Court ignores Jama's second argument.

The Government says that subparagraph (D) imposes the acceptance condition only on the Secretary's mandate to remove to the country of citizenship; it does not so condition the Secretary's discretionary authority. When acceptance is not forthcoming, the Government insists, the Secretary still has discretion to do what is merely no longer obligatory. But for at least two reasons, this reading is unsound.

The first is the textual contrast between steps one and two. As noted, subparagraph (C) can be read to give the Government express permission to ignore at step one a country's refusal to accept an alien: "The [Secretary] may disregard [an alien's] designation [of a country] if . . . the government of the country is not willing to accept the alien . . . ." § 1231(b)(2)(C). No such express grant of discretion appears in subparagraph (D), which provides that at step two, "the [Secretary] shall remove the alien to a country of [citizenship] unless the government of the country . . . is not willing to accept the alien . . . ." § 1231(b)(2)(D). The first of these ostensibly gives authority supplemented with discretion in the event that the acceptance condition is not satisfied; the second gives authority only if the acceptance condition is satisfied. The discretionary sounding language governing step one tends to show that Congress knew how to preserve the discretion to act in disregard of a country's nonacceptance; since it omitted any such provision suggesting discretion just a few lines later in subparagraph (D), the better inference is that Congress had no intent to allow the Government to ignore at step two a failure to accept by an alien's country of citizenship.[11] Once again in this case, then, drafting differ-

[11] Both the Court and the Government rely on such reasoning in another context, contending that because other parts of § 1231(b)(2) contain express acceptance requirements, no such requirement should be deemed to attach to subparagraphs (E)(i)–(vi). *Ante*, at 341 ("[O]ur reluctance [to imply an acceptance requirement] is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest"); Brief for Respondent 13 ("[T]he express references to acceptance in other parts of Section 1231(b)(2) simply highlight the absence of any such reference in Section 1231(b)(2)(E)(i)–(vi)"). As I

ences between provisions that address a similar subject may fairly be read to express differences in congressional intent.

The second reason to reject the Government's position follows from the text of the predecessor statute, which clearly provided that when acceptance was not forthcoming at step two, the Government had to move on to step three. The relevant language of the prior version (a version that consisted of one paragraph instead of the current five subparagraphs) read:

> "If the government of [the] country [of citizenship] fails finally to advise the Attorney General or the alien within three months . . . whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth [to one of the countries now listed in subparagraph (E)]." Immigration and Nationality Act of 1952, § 243(a), 66 Stat. 212.

Under this statute, the Government obviously lacked the discretion it now claims, of removing an alien at step two without the consent of the country of citizenship. This is significant for our purposes because, as already mentioned, two House Reports on the bill that transformed the old law into the new one indicate that no substantive changes were in-

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have discussed, of course, the Court's and the Government's application of this reasoning is misguided because the phrasing of subparagraph (E)(vii) expressly (through its use of the word "another") attaches an acceptance requirement to clauses (i)–(vi).

Notably, the Court embraces precisely the opposite reasoning elsewhere in its opinion, stating that the discretion given to the Secretary in subparagraph (E)(vii) "accords with the similar flexibility to pass over inappropriate countries that the statute gives the [Secretary] at the other steps . . . ." *Ante*, at 344. Why the Court is willing to find an implied grant of flexibility in subparagraph (D) even though "Congress has shown elsewhere in the same statute that it knows how to make such a [grant] manifest," *ante*, at 341, is something of a mystery.

tended. See *supra*, at 358. Given this documented intent, together with the absence of any contrary indication in the text or legislative history, the current version should be read as its predecessor was. See *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, *ante*, at 63 (rejecting an asserted substantive change because of "scant indication" that Congress intended it).

In sum, subparagraph (D) provides no authority to remove at step two without the consent of the country of citizenship. Jama is consequently correct that unless all of the options at step three are read as being subject to the same consent requirement, the requirement at step two will be nullified.

III

At the last ditch, the Court asserts that Jama's position would "abridge th[e] exercise of executive judgment," *ante*, at 344, and "run counter to our customary policy of deference to the President in matters of foreign affairs," *ante*, at 348. The Government similarly contends (throughout its brief) that Jama's approach would improperly limit the discretion of the Executive Branch. *E. g.*, Brief for Respondent 13 ("[C]onstruing Section 1231(b)(2)(E)(i)–(vi) not to require acceptance preserves the traditional authority of the Executive Branch to make case-by-case judgments in matters involving foreign relations"). But here Congress itself has significantly limited executive discretion by establishing a detailed scheme that the Executive must follow in removing aliens. This of course is entirely appropriate, since it is to Congress that the Constitution gives authority over aliens. Art. I, §8, cl. 4; see also, *e. g.*, *INS* v. *Chadha*, 462 U. S. 919, 940 (1983) ("The plenary authority of Congress over aliens under Art. I, §8, cl. 4, is not open to question"). Talk of judicial deference to the Executive in matters of foreign affairs, then, obscures the nature of our task here, which is to say not how much discretion we think the Executive ought to have, but how much discretion Congress has chosen to give it.

* * *

I would reverse the judgment of the Court of Appeals.

APPENDIX TO OPINION OF SOUTER, J.

Paragraph (1) of 8 U. S. C. § 1231(b) reads as follows:

"(1) Aliens arriving at the United States.

"Subject to paragraph (3)—

"(A) In general

"Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section [240] were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

"(B) Travel from contiguous territory

"If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States, an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

"(C) Alternative countries

"If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

"(i) The country of which the alien is a citizen, subject, or national.

"(ii) The country in which the alien was born.

"(iii) The country in which the alien has a residence.

"(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible."

Syllabus

CLARK, FIELD OFFICE DIRECTOR, SEATTLE, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. *v.* MARTINEZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–878. Argued October 13, 2004—Decided January 12, 2005*

If an alien is found inadmissible and ordered removed, the Secretary of Homeland Security (Secretary) ordinarily must remove the alien from the country within 90 days. 8 U. S. C. § 1231(a)(1)(A). Here, Martinez, respondent in No. 03–878, and Benitez, petitioner in No. 03–7434, Cuban nationals who are both inadmissible under § 1182, were ordered removed, but were detained beyond the 90-day removal period. Each filed a habeas corpus petition challenging his continued detention. In Martinez's case, the District Court found that removal was not reasonably foreseeable and ordered that Martinez be released under appropriate conditions. The Ninth Circuit affirmed. In Benitez's case, the District Court also accepted that removal would not occur in the foreseeable future, but nonetheless denied the petition. The Eleventh Circuit affirmed.

Held:

1. Under § 1231(a)(6), the Secretary may detain inadmissible aliens beyond the 90-day removal period, but only for so long as is reasonably necessary to achieve removal. Section 1231(a)(6)'s operative language, "may be detained beyond the removal period," applies equally to all aliens that are its subject, whether or not those aliens have been admitted to the country. In *Zadvydas* v. *Davis*, 533 U. S. 678, this Court interpreted § 1231(a)(6) to authorize the detention of aliens who have been admitted to the country only as long as "reasonably necessary" to effectuate their removal. *Id.*, at 689, 699. This interpretation must apply to inadmissible aliens as well. Even if the statutory purpose and constitutional concerns influencing the *Zadvydas* construction are not present for inadmissible aliens, that cannot justify giving the *same* statutory text a different meaning depending on the characteristics of the aliens involved. *Crowell* v. *Benson*, 285 U. S. 22, *Raygor* v. *Regents of Univ. of Minn.*, 534 U. S. 533, and *Jinks* v. *Richland County*, 538 U. S.

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*Together with No. 03–7434, *Benitez* v. *Rozos, Field Office Director, Miami, Immigration and Customs Enforcement*, on certiorari to the United States Court of Appeals for the Eleventh Circuit.

Syllabus

456, distinguished. Moreover, contrary to the Government's argument, nothing in *Zadvydas* indicates that § 1231(a)(6) authorizes detention until it approaches constitutional limits. Nor does § 1182(d)(5) independently authorize continued detention of these aliens. Pp. 377–386.

2. In *Zadvydas*, the Court further held that the presumptive period during which an alien's detention is reasonably necessary to effectuate removal is six months, and that he must be conditionally released after that time if he can demonstrate that there is "no significant likelihood of removal in the reasonably foreseeable future." 533 U. S., at 701. The Government having suggested no reason that the time reasonably necessary for removal is longer for an inadmissible alien, this same 6-month presumptive detention period applies in these cases. Because both Martinez and Benitez were detained well beyond six months after their removal orders became final, the Government has brought forward nothing to indicate that a substantial likelihood of removal subsists, and the District Court in each case has determined that removal to Cuba is not reasonably foreseeable, the habeas petitions should have been granted. Pp. 386–387.

No. 03–878, affirmed; No. 03–7434, 337 F. 3d 1289, reversed; and both cases remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 387. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined as to Part I–A, *post*, p. 388.

Deputy Solicitor General Kneedler argued the cause for petitioners in No. 03–878 and respondent in No. 03–7434. With him on the briefs were *Acting Solicitor General Clement*, former *Solicitor General Olson*, *Assistant Attorney General Keisler*, *Patricia A. Millett*, and *Donald E. Keener*.

Christine Stebbins Dahl, by appointment of the Court, 541 U. S. 986, argued the cause for respondent in No. 03–878. With her on the brief was *Stephen R. Sady*.

John S. Mills, by appointment of the Court, 541 U. S. 1084, argued the cause for petitioner in No. 03–7434. With him on the briefs were *Tracy S. Carlin* and *Rebecca B. Creed*.†

†Briefs of *amici curiae* urging reversal in No. 03–7434 were filed for the American Bar Association by *Dennis W. Archer*, *John J. Gibbons*, *Lawrence S. Lustberg*, *Jonathan L. Hafetz*, and *Philip G. Gallagher*; for the

JUSTICE SCALIA delivered the opinion of the Court.

An alien arriving in the United States must be inspected by an immigration official, 66 Stat. 198, as amended, 8 U. S. C. § 1225(a)(3), and, unless he is found "clearly and beyond a doubt entitled to be admitted," must generally undergo removal proceedings to determine admissibility, § 1225(b)(2)(A). Meanwhile the alien may be detained, subject to the Secretary's discretionary authority to parole him into the country. See § 1182(d)(5); 8 CFR § 212.5 (2004). If, at the conclusion of removal proceedings, the alien is determined to be inadmissible and ordered removed, the law provides that the Secretary of Homeland Security "shall remove the alien from the United States within a period of 90 days," 8 U. S. C. § 1231(a)(1)(A). These cases concern the Secretary's authority to continue to detain an inadmissible alien subject to a removal order *after* the 90-day removal period has elapsed.

American Civil Liberties Union by *Judy Rabinovitz, Lucas Guttentag, Steven R. Shapiro, Paul A. Engelmayer,* and *David Sapir Lesser;* for the American Immigration Law Foundation Legal Action Center et al. by *George E. Quillin, G. Michael Halfenger,* and *Michael D. Leffel;* for the Florida Immigrant Advocacy Center et al. by *Stephen F. Hanlon;* for the Lawyers Committee for Human Rights et al. by *Steven E. Fineman, Bill Lann Lee,* and *Deborah Pearlstein;* for Legal and Service Organizations by *Joseph F. Tringali;* for the North Carolina Justice and Community Development Center by *James E. Coleman, Jr.;* and for Regina Germain et al. by *David J. Bodney.*

Daniel J. Popeo and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging affirmance in No. 03–7434 and reversal in No. 03–878.

Briefs of *amici curiae* urging affirmance in No. 03–878 were filed for the Cuban American Bar Association et al. by *Catherine E. Stetson, William H. Johnson,* and *Gilbert Paul Carrasco;* for National Refugee Resettlement and Advocacy Organizations by *Peter M. Friedman;* for Religious Organizations by *Isabelle M. Carrillo;* and for Stuart E. Eizenstat et al. by *David H. Remes.*

Jonathan J. Ross and *Melford O. Cleveland* filed a brief for Law Professors as *amici curiae* in No. 03–7434.

I

Sergio Suarez Martinez (respondent in No. 03–878) and Daniel Benitez (petitioner in No. 03–7434) arrived in the United States from Cuba in June 1980 as part of the Mariel boatlift, see *Palma* v. *Verdeyen*, 676 F. 2d 100, 101 (CA4 1982) (describing circumstances of Mariel boatlift), and were paroled into the country pursuant to the Attorney General's authority under 8 U. S. C. § 1182(d)(5).[1] See Pet. for Cert. in No. 03–878, p. 7; *Benitez* v. *Wallis*, 337 F. 3d 1289, 1290 (CA11 2003). Until 1996, federal law permitted Cubans who were paroled into the United States to adjust their status to that of lawful permanent resident after one year. See Cuban Refugee Adjustment Act, 80 Stat. 1161, as amended, notes following 8 U. S. C. § 1255. Neither Martinez nor Benitez qualified for this adjustment, however, because, by the time they applied, both men had become inadmissible because of prior criminal convictions in the United States. When Martinez sought adjustment in 1991, he had been convicted of assault with a deadly weapon in Rhode Island and burglary in California, Pet. for Cert. in No. 03–878, at 7; when Benitez sought adjustment in 1985, he had been convicted of grand theft in Florida, 337 F. 3d, at 1290. Both men were convicted of additional felonies after their adjustment applications were denied: Martinez of petty theft with a prior conviction (1996), assault with a deadly weapon (1998), and attempted oral copulation by force (1999), see Pet. for Cert. in No. 03–878, at 7–8; Benitez of two counts of armed robbery, armed burglary of a conveyance, armed burglary of a structure, aggravated battery, carrying a concealed firearm,

[1] The authorities described herein as having been exercised by the Attorney General and the Immigration and Naturalization Service (INS) now reside in the Secretary of Homeland Security (hereinafter Secretary) and divisions of his Department (Bureau of Immigration and Customs Enforcement and Bureau of Citizenship and Immigration Services). See Homeland Security Act of 2002, §§ 441(2), 442(a)(3), 451(b), 116 Stat. 2192, 2193, 2196, 6 U. S. C. §§ 251(2), 252(a)(3), 271(b) (2000 ed., Supp. II).

unlawful possession of a firearm while engaged in a criminal offense, and unlawful possession, sale, or delivery of a firearm with an altered serial number (1993), see 337 F. 3d, at 1290–1291.

The Attorney General revoked Martinez's parole in December 2000. Martinez was taken into custody by the INS, and removal proceedings were commenced against him. Pet. for Cert. in No. 03–878, at 8. An Immigration Judge found him inadmissible by reason of his prior convictions, § 1182(a)(2)(B), and lack of sufficient documentation, § 1182(a)(7)(A)(i)(I), and ordered him removed to Cuba. Martinez did not appeal. Pet. for Cert. in No. 03–878, at 8. The INS continued to detain him after expiration of the 90-day removal period, and he remained in custody until he was released pursuant to the District Court order that was affirmed by the Court of Appeals' decision on review here. *Id.*, at 9.

Benitez's parole was revoked in 1993 (shortly after he was imprisoned for his convictions of that year), and the INS immediately initiated removal proceedings against him. In December 1994, an Immigration Judge determined Benitez to be excludable and ordered him deported under §§ 1182(a)(2)(B) and 1182(a)(7)(A)(i)(I) (1994 ed. and Supp. V).[2] 337 F. 3d, at 1291. Benitez did not seek further review. At the completion of his state prison term, the INS took him into custody for removal, and he continued in custody after expiration of the 90-day removal period. *Ibid.* In September 2003, Benitez received notification that he was eligible for parole, contingent on his completion of a drug-

[2] Before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, aliens ineligible to enter the country were denominated "excludable" and ordered "deported." 8 U. S. C. §§ 1182(a), 1251(a)(1)(A) (1994 ed.); see *Landon* v. *Plasencia*, 459 U. S. 21, 25–26 (1982). Post-IIRIRA, such aliens are said to be "inadmissible" and held to be "removable." 8 U. S. C. §§ 1182(a), 1229a(e)(2) (2000 ed.).

abuse treatment program. Letter from Paul D. Clement, Acting Solicitor General, to William K. Suter, Clerk of Court, 1 (Nov. 3, 2004). Benitez completed the program while his case was pending before this Court, and shortly after completion was paroled for a period of one year. *Ibid.* On October 15, 2004, two days after argument in this Court, Benitez was released from custody to sponsoring family members.[3] *Id.*, at 2.

Both aliens filed a petition for a writ of habeas corpus under 28 U. S. C. § 2241 to challenge their detention beyond the 90-day removal period. In Martinez's case, the District Court for the District of Oregon accepted that removal was not reasonably foreseeable, and ordered the INS to release Martinez under conditions that the INS believed appropriate. *Martinez* v. *Smith*, No. CV 02–972–PA (Oct. 30, 2002), App. to Pet. for Cert. in No. 03–878, p. 2a. The Court of Appeals for the Ninth Circuit summarily affirmed, citing its decision in *Xi* v. *INS*, 298 F. 3d 832 (2002). *Martinez* v. *Ashcroft*, No. 03–35053 (Aug. 18, 2003), App. to Pet. for Cert. in No. 03–878, at 1a. In Benitez's case, the District Court for the Northern District of Florida also concluded that removal would not occur in the "foreseeable future," but nonetheless denied the petition. *Benitez* v. *Wallis*, Case No. 5:02cv19 MMP (July 11, 2002), pp. 2, 4, App. in

[3] Despite Benitez's release on a 1-year parole, this case continues to present a live case or controversy. If Benitez is correct, as his suit contends, that the Government lacks the authority to continue to detain him, he would have to be released, and could not be taken back into custody unless he violated the conditions of release (in which case detention would be authorized by § 1253), or his detention became necessary to effectuate his removal (in which case detention would once again be authorized by § 1231(a)(6)). His current release, however, is not only limited to one year, but subject to the Secretary's discretionary authority to terminate. See 8 CFR § 212.12(h) (2004) (preserving discretion to revoke parole). Thus, Benitez "continue[s] to have a personal stake in the outcome" of his petition. *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 477–478 (1990) (internal quotation marks omitted).

No. 03–7434, pp. 45, 48. The Court of Appeals for the Eleventh Circuit affirmed, agreeing with the dissent in *Xi*. 337 F. 3d 1289 (2003). We granted certiorari in both cases. *Benitez* v. *Mata*, 540 U. S. 1147 (2004); *Crawford* v. *Martinez*, 540 U. S. 1217 (2004).

II

Title 8 U. S. C. § 1231(a)(6) provides, in relevant part, as follows:

> "An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the [Secretary] to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)."

By its terms, this provision applies to three categories of aliens: (1) those ordered removed who are inadmissible under § 1182, (2) those ordered removed who are removable under § 1227(a)(1)(C), § 1227(a)(2), or § 1227(a)(4), and (3) those ordered removed whom the Secretary determines to be either a risk to the community or a flight risk. In *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), the Court interpreted this provision to authorize the Attorney General (now the Secretary) to detain aliens in the second category only as long as "reasonably necessary" to remove them from the country. *Id.*, at 689, 699. The statute's use of "may," the Court said, "suggests discretion," but "not necessarily . . . unlimited discretion. In that respect the word 'may' is ambiguous." *Id.*, at 697. In light of that perceived ambiguity and the "serious constitutional threat" the Court believed to be posed by indefinite detention of aliens who had been admitted to the country, *id.*, at 699, the Court interpreted the statute to permit only detention that is related to the statute's "basic purpose [of] effectuating an alien's removal," *id.*, at 696–699.

"[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized." *Id.*, at 699. The Court further held that the presumptive period during which the detention of an alien is reasonably necessary to effectuate his removal is six months; after that, the alien is eligible for conditional release if he can demonstrate that there is "no significant likelihood of removal in the reasonably foreseeable future." *Id.*, at 701.

The question presented by these cases, and the question that evoked contradictory answers from the Ninth and Eleventh Circuits, is whether this construction of § 1231(a)(6) that we applied to the second category of aliens covered by the statute applies as well to the first—that is, to the category of aliens "ordered removed who [are] inadmissible under [§] 1182." We think the answer must be yes. The operative language of § 1231(a)(6), "may be detained beyond the removal period," applies without differentiation to all three categories of aliens that are its subject. To give these same words a different meaning for each category would be to invent a statute rather than interpret one. As the Court in *Zadvydas* recognized, the statute can be construed "literally" to authorize indefinite detention, *id.*, at 689, or (as the Court ultimately held) it can be read to "suggest [less than] unlimited discretion" to detain, *id.*, at 697. It cannot, however, be interpreted to do both at the same time.

The dissent's belief that *Zadvydas* compels this result rests primarily on that case's statement that "[a]liens who have not yet gained initial admission to this country would present a very different question," *id.*, at 682. See *post*, at 390, 393 (opinion of THOMAS, J.). This mistakes the reservation of a question with its answer. Neither the opinion of the Court nor the dissent in *Zadvydas* so much as hints that the Court adopted the novel interpretation of § 1231(a)(6) proposed by today's dissent. The opinion in that case con-

sidered whether § 1231(a)(6) permitted the Government to detain removable aliens indefinitely; relying on ambiguities in the statutory text and the canon that statutes should be interpreted to avoid constitutional doubts, the opinion held that it did not. Despite the dissent's repeated claims that § 1231(a)(6) could not be given a different reading for inadmissible aliens, see *Zadvydas, supra,* at 710, 716–717 (opinion of KENNEDY, J.), the Court *refused to decide* that question—the question we answer today. It is indeed different from the question decided in *Zadvydas,* but because the statutory text provides for no distinction between admitted and nonadmitted aliens, we find that it results in the same answer.[4]

The dissent's contention that our reading of *Zadvydas* is "implausible," *post,* at 389, is hard to reconcile with the fact that it is the identical reading espoused by the *Zadvydas* dissenters, who included the author of today's dissent. Worse still, what the *Zadvydas* dissent *did* find "not . . . plausible" was precisely the reading adopted by today's dissent:

> "[T]he majority's logic might be that inadmissible and removable aliens can be treated differently. Yet it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility. As a result, it is difficult to see why '[a]liens who have not yet gained initial admission to this country would present a very differ-

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[4] The dissent is quite wrong in saying, *post,* at 390, that the *Zadvydas* Court's belief that § 1231(a)(6) did not apply to all aliens is evidenced by its statement that it did not "consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention," 533 U. S., at 696. The Court's interpretation of § 1231(a)(6) did not affect the detention of alien terrorists for the simple reason that sustained detention of alien terrorists is a "special arrangement" authorized by a different statutory provision, 8 U. S. C. § 1537(b)(2)(C). See *Zadvydas, supra,* at 697.

ent question.'" 533 U. S., at 710–711 (opinion of KENNEDY, J.).

The *Zadvydas* dissent later concluded that the release of "Mariel Cubans and other illegal, inadmissible aliens . . . would seem *a necessary consequence of the majority's construction of the statute.*" *Id.*, at 717 (emphasis added). Tellingly, the *Zadvydas* majority did not negate either charge.

The Government, joined by the dissent, argues that the statutory purpose and the constitutional concerns that influenced our statutory construction in *Zadvydas* are not present for aliens, such as Martinez and Benitez, who have not been admitted to the United States. Be that as it may, it cannot justify giving the *same* detention provision a different meaning when such aliens are involved. It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern. See, *e. g.*, *Leocal* v. *Ashcroft*, *ante*, at 11–12, n. 8 (explaining that, if a statute has criminal applications, "the rule of lenity applies" to the Court's interpretation of the statute even in immigration cases "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context"); *United States* v. *Thompson/Center Arms Co.*, 504 U. S. 505, 517–518, and n. 10 (1992) (plurality opinion) (employing the rule of lenity to interpret "a tax statute . . . in a civil setting" because the statute "has criminal applications"); *id.*, at 519 (SCALIA, J., concurring in judgment) (also invoking the rule of lenity). In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of con-

stitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.[5]

The dissent takes issue with this maxim of statutory construction on the ground that it allows litigants to "attack statutes as constitutionally invalid based on constitutional doubts concerning other litigants or factual circumstances" and thereby to effect an "end run around black-letter constitutional doctrine governing facial and as-applied constitutional challenges." *Post*, at 396. This accusation misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory interpretation. The canon is not a method of adjudicating constitutional questions by other means. See, *e. g.*, *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 502 (1979) (refusing to engage in extended analysis in the process of applying the avoidance canon "as we would were we considering the constitutional issue"); see also Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1960–1961 (1997) (providing examples of cases where the Court construed a statute narrowly to avoid a constitutional question ultimately resolved in favor of the broader reading). Indeed, one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.

[5] Contrary to the dissent's contentions, *post*, at 394, our decision in *Salinas* v. *United States*, 522 U. S. 52 (1997), is perfectly consistent with this principle of construction. In *Salinas*, the Court rejected the petitioner's invocation of the avoidance canon because the text of the statute was "unambiguous on the point under consideration." *Id.*, at 60. For this reason, the Court squarely addressed and rejected any argument that the statute was unconstitutional as applied to the petitioner. *Id.*, at 61 (holding that, under the construction adopted by the Court, "the statute is constitutional as applied in this case").

See *Rust* v. *Sullivan*, 500 U. S. 173, 191 (1991); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). The canon is thus a means of giving effect to congressional intent, not of subverting it. And when a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional rights of others, as the dissent believes; he seeks to vindicate his own *statutory* rights. We find little to recommend the novel interpretive approach advocated by the dissent, which would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case. Cf. *Harris* v. *United States*, 536 U. S. 545, 556 (2002) (rejecting "a dynamic view of statutory interpretation, under which the text might mean one thing when enacted yet another if the prevailing view of the Constitution later changed").

In support of its contention that we can give § 1231(a)(6) a different meaning when it is applied to nonadmitted aliens, the Government relies most prominently upon our decision in *Crowell* v. *Benson*, 285 U. S. 22 (1932). Brief for Petitioners in No. 03–878, p. 29; Brief for Respondent in No. 03–7434, p. 29. That case involved a statutory provision that gave the Deputy Commissioner of the United States Employees' Compensation Commission "'full power and authority to hear and determine all questions in respect of'" claims under the Longshoremen's and Harbor Workers' Compensation Act. 285 U. S., at 62. The question presented was whether this provision precluded review of the Deputy Commissioner's determination that the claimant was an employee, and hence covered by the Act. The Court held that, although the statute could be read to bar judicial review altogether, it was also susceptible of a narrower reading that permitted judicial review of the fact of employment, which was an "essential condition precedent to the right to make the claim." *Ibid.* The Court adopted the latter construction in order to avoid serious constitutional questions that it believed would

be raised by total preclusion of judicial review. *Ibid.* This holding does *not* produce a statute that bears two different meanings, depending on the presence or absence of a constitutional question. Always, and as applied to all claimants, it permits judicial review of the employment finding. What corresponds to *Crowell* v. *Benson*'s holding that the fact of employment is judicially reviewable is *Zadvydas*'s holding that detention cannot be continued once removal is no longer reasonably foreseeable—and like the one, the other applies in all cases.

The dissent, on the other hand, relies on our recent cases interpreting 28 U. S. C. § 1367(d). *Raygor* v. *Regents of Univ. of Minn.*, 534 U. S. 533 (2002), held that this provision does not include, in its tolling of limitations periods, claims against States that have not waived their immunity from suit in federal court because the statutory language fails to make "'"unmistakably clear,"'" as it must in provisions subjecting States to suit, that such States were covered. *Id.*, at 543–546. A subsequent decision, *Jinks* v. *Richland County*, 538 U. S. 456 (2003), held that the tolling provision *does* apply to claims against political subdivisions of States, since the requirement of the unmistakably clear statement did not apply to those entities. *Id.*, at 466. This progression of decisions does not remotely establish that § 1367(d) has two different meanings, equivalent to the unlimited-detention/limited-detention meanings of § 1231(a)(6) urged upon us here. They hold that the single and unchanging disposition of § 1367(d) (the tolling of limitations periods) does not apply to claims against States that have not consented to be sued in federal court.[6]

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[6] The dissent concedes this is so but argues, *post*, at 393–394, that, because the Court reached this conclusion "only after analyzing whether the constitutional doubts at issue in *Raygor* applied to the county defendant" in *Jinks*, *post*, at 394, we must engage in the same quasi-constitutional analysis here before applying the construction adopted in *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), to the aliens in these cases. This overlooks a

We also reject the Government's argument that, under *Zadvydas*, § 1231(a)(6) "authorizes detention until it approaches constitutional limits." Brief for Petitioners in No. 03–878, at 27–28; Brief for Respondent in No. 03–7434, at 27–28. The Government provides no citation to support that description of the case—and none exists. *Zadvydas* did not hold that the statute authorizes detention until it approaches constitutional limits; it held that, *since* interpreting the statute to authorize indefinite detention (one plausible reading) would approach constitutional limits, the statute should be read (in line with the other plausible reading) to authorize detention only for a period consistent with the purpose of effectuating removal. 533 U. S., at 697–699. If we were, as the Government seems to believe, free to "interpret" statutes as becoming inoperative when they "approach constitutional limits," we would be able to spare ourselves the necessity of ever finding a statute unconstitutional as applied. And the doctrine that statutes should be construed to contain substantive dispositions that do not raise constitutional difficulty would be a thing of the past; no need for such caution, since—*whatever* the substantive dispositions are—they become inoperative when constitutional limits are "ap-

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critical distinction between the question before the Court in *Jinks* and the one before us today. In *Jinks*, the county could not claim the aid of *Raygor* itself because *Raygor* held only that § 1367(d) did not include suits against nonconsenting *States;* instead, the county argued *by analogy to Raygor* that, absent a clear statement of congressional intent, § 1367(d) should be construed not to include suits against political subdivisions of States. And thus the Court in *Jinks* considered not whether *Raygor*'s interpretation of § 1367(d) was directly controlling but whether the constitutional concerns that justified the requirement of a clear statement in *Raygor* applied as well in the case of counties. In the present cases, by contrast, the aliens ask simply that the interpretation of § 1231(a)(6) announced in *Zadvydas* be applied to them. This question does not compel us to compare analogous constitutional doubts; it simply requires that we determine whether the statute construed by *Zadvydas* permits any distinction to be drawn between aliens who have been admitted and aliens who have not.

proached." That is not the legal world we live in. The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between them.* See, *e. g., Almendarez-Torres* v. *United States,* 523 U. S. 224, 237–238 (1998); *United States ex rel. Attorney General* v. *Delaware & Hudson Co.,* 213 U. S. 366, 408 (1909). In *Zadvydas,* it was the statute's text read in light of its purpose, not some implicit statutory command to avoid approaching constitutional limits, which produced the rule that the Secretary may detain aliens only for the period reasonably necessary to bring about their removal. See 533 U. S., at 697–699.

In passing in its briefs, but more intensively at oral argument, the Government sought to justify its continued detention of these aliens on the authority of § 1182(d)(5)(A).[7] Even assuming that an alien who is subject to a final order of removal is an "alien applying for admission" and therefore eligible for parole under this provision, we find nothing in this text that affirmatively authorizes detention, much less indefinite detention. To the contrary, it provides that, when parole is revoked, "the alien shall . . . be returned to the custody from which he was paroled and thereafter *his case shall continue to be dealt with in the same manner as that of any other applicant for admission.*" *Ibid.* (emphasis

[7] Section 1182(d)(5)(A) reads as follows:

"The [Secretary] may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the [Secretary], have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

added). The manner in which the case of any other applicant would be "dealt with" beyond the 90-day removal period is prescribed by § 1231(a)(6), which we interpreted in *Zadvydas* and have interpreted above.

* * *

The Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it.[8] But for this Court to sanction indefinite detention in the face of *Zadvydas* would establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases.

Since the Government has suggested no reason why the period of time reasonably necessary to effect removal is longer for an inadmissible alien, the 6-month presumptive detention period we prescribed in *Zadvydas* applies. See 533 U. S., at 699–701. Both Martinez and Benitez were detained well beyond six months after their removal orders became final. The Government having brought forward nothing to indicate that a substantial likelihood of removal subsists despite the passage of six months (indeed, it concedes that it is no longer even involved in repatriation negotiations with Cuba); and the District Court in each case having determined that removal to Cuba is not reasonably foreseeable; the petitions for habeas corpus should have been

[8] That Congress has the capacity to do so is demonstrated by its reaction to our decision in *Zadvydas*. Less than four months after the release of our opinion, Congress enacted a statute which expressly authorized continued detention, for a period of six months beyond the removal period (and renewable indefinitely), of any alien (1) whose removal is not reasonably foreseeable and (2) who presents a national security threat or has been involved in terrorist activities. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), § 412(a), 115 Stat. 350 (enacted Oct. 26, 2001) (codified at 8 U. S. C. § 1226a(a)(6) (2000 ed., Supp. II)).

granted. Accordingly, we affirm the judgment of the Ninth Circuit, reverse the judgment of the Eleventh Circuit, and remand both cases for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I join the Court's opinion. I write separately to emphasize that, even under the current statutory scheme, it is possible for the Government to detain inadmissible aliens for more than six months after they have been ordered removed. For one thing, the 6-month presumption we described in *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), is just that—a presumption. The Court notes that the Government has not suggested here any reason why it takes longer to effect removal of inadmissible aliens than it does to effect removal of other aliens. It is conceivable, however, that a longer period *is* "reasonably necessary," *id.*, at 689, to effect removal of inadmissible aliens as a class. If the Government shows that to be true, then detention beyond six months will be lawful within the meaning we ascribed to 8 U. S. C. § 1231(a)(6) in *Zadvydas*.

Moreover, the Government has other statutory means for detaining aliens whose removal is not foreseeable and whose presence poses security risks. Upon certifying that he has "reasonable grounds to believe" an alien has engaged in certain terrorist or other dangerous activity specified by statute, 8 U. S. C. § 1226a(a)(3) (2000 ed., Supp. II), the Secretary of Homeland Security may detain that alien for successive 6-month periods "if the release of the alien will threaten the national security of the United States or the safety of the community or any person," § 1226a(a)(6).

Finally, any alien released as a result of today's holding remains subject to the conditions of supervised release. See § 1231(a)(3); 8 CFR § 241.5 (2004). And, if he fails to comply with the conditions of release, he will be subject to crim-

inal penalties—including further detention. See 8 U. S. C. § 1253(b); *Zadvydas, supra,* at 695 ("[W]e nowhere deny the right of Congress . . . to subject [aliens] to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions").

JUSTICE THOMAS, with whom THE CHIEF JUSTICE joins as to Part I–A, dissenting.

Title 8 U. S. C. § 1231(a)(6) states that aliens whom the Secretary of Homeland Security has ordered removed "may be detained beyond the removal period." Nevertheless, in *Zadvydas* v. *Davis,* 533 U. S. 678 (2001), this Court construed this provision "to contain an implicit 'reasonable time' limitation" on the Secretary's power to detain admitted aliens "[b]ased on our conclusion that indefinite detention of" those aliens "would raise serious constitutional concerns." *Id.,* at 682. "Aliens who have not yet gained initial admission to this country," the Court assured us, "would present a very different question." *Ibid.*

Today, the Court holds that this constitutional distinction—which "made all the difference" to the *Zadvydas* Court, *id.,* at 693—is actually irrelevant, because "[t]he operative language of § 1231(a)(6) . . . applies without differentiation to all three categories of aliens that are its subject." *Ante,* at 378. While I wholeheartedly agree with the Court's fidelity to the text of § 1231(a)(6), the Court's analysis cannot be squared with *Zadvydas.* And even if it could be so squared, *Zadvydas* was wrongly decided and should be overruled. I respectfully dissent.

I

I begin by addressing the majority's interpretation of *Zadvydas.* The Court's interpretation is not a fair reading of that case. It is also not required by any sound principle of statutory construction of which I am aware. To the con-

trary, what drives the majority's reading is a novel "lowest common denominator" principle. *Ante*, at 380.

A

The majority's reading of *Zadvydas* is implausible. *Zadvydas* held that interpreting § 1231(a)(6) to authorize indefinite detention of admitted aliens later found removable would raise serious due process concerns. 533 U. S., at 690–696. The Court therefore read the statute to permit the Attorney General (now the Secretary of Homeland Security) to detain admitted aliens only as long as reasonably necessary to remove them from the country. *Id.*, at 699.

The majority concedes that *Zadvydas* explicitly reserved the question whether its statutory holding as to *admitted* aliens applied equally to *inadmissible* aliens. *Ante*, at 379. This reservation was front and center in *Zadvydas*. It appeared in the introduction and is worth repeating in full:

> "In these cases, we must decide whether [§ 1231(a)(6)] authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal. We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question. Based on our conclusion that indefinite detention of aliens in the former category would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review." 533 U. S., at 682 (citation omitted; emphasis in original).

The Court reserved this question because the *constitutional* questions raised by detaining inadmissible aliens are different from those raised by detaining admitted aliens. It stated that the detention period in § 1231(a)(6) was limited

because it "read [the statute] in light of the Constitution's demands." *Id.*, at 689. And it repeatedly emphasized constitutional distinctions among various groups of aliens, for which § 1231(a)(6) makes no distinctions. See *id.*, at 693–694 (noting the different constitutional considerations applicable to inadmissible and admissible aliens); *id.*, at 695 (noting that "the cases before us [do not] require us to consider the political branches' authority to control entry into the United States"); *id.*, at 696 (noting that the opinion did not "consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security").

The majority's reading of *Zadvydas* is inconsistent with these qualifications. If it were true that *Zadvydas*' interpretation of § 1231(a)(6) applied to all aliens regardless of the constitutional concerns involved in each case, then the question of how § 1231(a)(6) applies to them would not be "very different" depending on the alien before the Court. The question would be trivial because the text of § 1231(a)(6) plainly does not distinguish between admitted and nonadmitted aliens. There would also have been no need for the Court to go out of its way to leave aside "terrorism or other special circumstances," *ibid.*, or to disavow "consider-[ation of] the political branches' authority to control entry into the United States," *id.*, at 695, for the construction the majority extracts from *Zadvydas* would have applied across the board, *ibid.* And the Court's rationalization that its construction would therefore "leave no unprotected spot in the Nation's armor," *id.*, at 695–696 (internal quotation marks omitted), would have been incorrect. The constitutional distinctions that pervade *Zadvydas* are evidence that the "very different" statutory question it reserved turned on them.

The *Zadvydas* Court thus tethered its reading of § 1231(a)(6) to the specific class of aliens before it. The term this Court read into the statute was not simply a presump-

tive 6-month period, but a presumptive 6-month period for admitted aliens. Its reading of the statute "in light of the Constitution's demands," *id.*, at 689, that is, depended on the constitutional considerations at work in *"the cases before [it],"* *id.*, at 695 (emphasis added). One would expect the Court today, then, to follow the same two-step procedure it employed in *Zadvydas*. It should first ask whether the statute is ambiguous and, if so, whether one of the possible interpretations raises constitutional doubts as applied to respondent Martinez and petitioner Benitez. Step one is dictated by *Zadvydas:* Section 1231(a)(6) is not clear on whether it permits indefinite detention. The Court should then move to the second step and ask whether either of the statute's possible interpretations raises constitutional doubts as applied to Benitez and Martinez. If so, the Court would apply avoidance to adopt the interpretation free from constitutional doubt (as *Zadvydas* itself did).

The Court's reasons for departing from this reading of *Zadvydas* are unpersuasive. The Court says that its reading is necessary to avoid "invent[ing] a statute rather than interpret[ing] one," *ante*, at 378; to preclude "giving the *same* detention provision a different meaning" depending on the aliens before the Court, *ante*, at 380 (emphasis in original); and to forestall establishing "the dangerous principle that judges can give the same statutory text different meanings in different cases," *ante*, at 386. I agree that we should adopt none of these principles, but this is no warrant for the reading of *Zadvydas* that the majority advocates. *Zadvydas* established a single and unchanging, if implausible, meaning of § 1231(a)(6): that the detention period authorized by § 1231(a)(6) depends not only on the circumstances surrounding a removal, but also on the type of alien ordered removed.

I grant that this understanding of *Zadvydas* could result in different detention periods for different classes of aliens—indefinite detention for some, limited detention for others.

But it does not follow that this reads the meaning of the statute to "change" depending on the alien involved, any more than the meaning of the statute could be said to "change" simply because the time that is "reasonably necessary to effect removal" may differ depending on the type of alien involved, as both the Court's opinion, *ante*, at 386, and JUSTICE O'CONNOR's concurring opinion, *ante*, at 387, concede it may. A statute's sense is the same even if what it requires depends on factual context.

In support of its reading of *Zadvydas*, the Court relies on a statement in a dissent in *Zadvydas* that § 1231(a)(6) could not be given a different reading for inadmissible aliens. *Ante*, at 379–380 (citing 533 U. S., at 710–711, 717 (opinion of KENNEDY, J.)). That dissenting view, as the very quotation the majority stresses demonstrates, rested on the dissent's premise that "it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another." *Id.*, at 710. But the *Zadvydas* majority disagreed with that assumption and adopted a contrary interpretation of § 1231(a)(6). For as the dissent recognized, *Zadvydas*' "logic might be that inadmissible and removable aliens can be treated differently." *Ibid.* That was *Zadvydas*' logic precisely, as its repeated statements limiting its decision to inadmissible aliens show. To interpret *Zadvydas* properly, we must take its logic as given, not the logic of the *reductio ad absurdum* of *Zadvydas* that I joined in dissent.

B

The majority strains to recharacterize *Zadvydas* because it thinks that "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Ante*, at 380. In other words, it claims, "[t]he lowest common denominator, as it were, must govern." *Ibid.* I disagree.

As an initial matter, this principle is inconsistent with *Zadvydas* itself. As explained above, the limiting construction *Zadvydas* adopted as to admitted aliens does not necessarily govern the other applications of § 1231(a)(6). If the majority is correct that the "lowest common denominator" governs, then the careful distinction *Zadvydas* drew between admitted aliens and nonadmitted aliens was irrelevant at best and misleading at worst. Under this reading, *Zadvydas* would have come out the same way even if it had involved inadmissible aliens, for the "lowest common denominator" of the statute remains the same regardless of the identity of the alien before the Court. Again, this understanding of *Zadvydas* is implausible.

Beyond *Zadvydas*, the Court offers scant support for the idea that statutes should be stripped down to their "lowest common denominator[s]." It attempts to distinguish *Jinks* v. *Richland County*, 538 U. S. 456 (2003), and *Raygor* v. *Regents of Univ. of Minn.*, 534 U. S. 533 (2002), *ante*, at 383, and n. 6, yet these cases employed exactly the procedure that the majority today says is impermissible. They construed 28 U. S. C. § 1367(d),[1] a tolling provision, to apply to States and political subdivisions of States only to the extent that doing so would raise a constitutional doubt as applied to either entity. *Jinks* was explicit on this point:

> "Although we held in *[Raygor]* that § 1367(d) does not apply to claims filed in federal court against *States* but subsequently dismissed on sovereign immunity grounds, we did so to avoid interpreting the statute in a manner that would raise 'serious constitutional doubt' in light of our decisions protecting a *State's* sovereign immunity

[1] Section 1367(d) provides that "[t]he period of limitations for any claim asserted under [§ 1367(a)], and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under [§ 1367(a)], shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

> from congressional abrogation . . . . [N]o such constitutional doubt arises from holding that petitioner's claim against respondent—which is not a State, but a political subdivision of a State—falls under the definition of '*any claim* asserted under subsection (a) [of § 1367].'" 538 U. S., at 466 (emphasis in original).

This passage reads the meaning of § 1367(d)—which applies to "any claim asserted under subsection (a)" of § 1367—to hinge on the constitutional context. The Court is correct that *Jinks* and *Raygor* "hold that the single and unchanging disposition of § 1367(d) . . . does not apply to claims against States." *Ante*, at 383. But as the Court concedes, *Jinks* reached that holding only after analyzing whether the constitutional doubts at issue in *Raygor* applied to the county defendant. *Ante*, at 383–384, n. 6. The Court's failure to do the same here cannot be reconciled with *Jinks* and *Raygor*: the Court should ask whether the constitutional concerns that justified the requirement of a clear statement in *Zadvydas* apply as well to inadmissible aliens.

The Court's "lowest common denominator" principle is also in tension with *Salinas* v. *United States*, 522 U. S. 52 (1997). There, we rejected an argument that the federal bribery statute, 18 U. S. C. § 666(a)(1)(B), should be construed to avoid constitutional doubts, in part on the ground that there was "no serious *doubt* about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case." 522 U. S., at 60 (emphasis added). Unlike the Court's approach to avoidance today, we disclaimed examination of the constitutionality of applications not before the Court: "Whatever might be said about § 666(a)(1)(B)'s application in other cases, the application of § 666(a)(1)(B) . . . did not extend federal power beyond its proper bounds." *Id.*, at 61. The Court is mistaken that this passage in *Salinas* was a rejection of a constitutional argument on its merits. *Ante*, at 381, n. 5. Salinas, the petitioner, phrased his question presented solely in terms of the proper statutory interpretation of

§ 666(a)(1)(B), Brief for Petitioner, O. T. 1996, No. 96–738, p. i, and never claimed that the statute was unconstitutional, see generally *ibid.*

C

More importantly, however, the Court's "lowest common denominator" principle is inconsistent with the history of the canon of avoidance and is likely to have mischievous consequences. The modern canon of avoidance is a doctrine under which courts construe ambiguous statutes to avoid constitutional doubts, but this doctrine has its origins in a very different form of the canon. Traditionally, the avoidance canon was not a doctrine under which courts read statutes to avoid mere constitutional doubts. Instead, it commanded courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading.[2] The traditional version of the canon thus requires courts to reach the issue whether the doubtful version of the statute is constitutional before adopting the construction that saves the statute from constitutional invalidity. A court faced with an ambiguous statute applies traditional avoidance by asking whether, given two plausible interpretations of that statute, one would be unconstitutional *as applied to the plaintiff;* and, if that interpretation is actually unconstitutional as applied to the plaintiff, the court picks the other (constitutional) read-

[2] See *Rust* v. *Sullivan*, 500 U. S. 173, 190–191 (1991) (distinguishing the classic and modern versions of the canon and citing cases); *Hooper* v. *California*, 155 U. S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality"); *Mossman* v. *Higginson*, 4 Dall. 12, 14 (1800) (reasoning that the statute under review "can, and must receive a construction, consistent with the constitution"); *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, J.); Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1949 (1997); H. Black, Handbook on the Construction and Interpretation of the Laws 113–114 (2d ed. 1911). The modern version seems to have originated in *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909).

ing. The court does not inquire whether either of the interpretations would be unconstitutional if applied to third parties not before the court, unless the challenge is facial or otherwise implicates third-party rights.

This history suggests that the "lowest common denominator" principle is mistaken. Courts applying the modern version of the canon of avoidance should no more look to the rights of third parties than do courts using the traditional version. Under modern avoidance, in other words, an ambiguous statute should be read to avoid a constitutional doubt only if the statute is constitutionally doubtful as applied to the litigant before the court (again, unless the constitutional challenge involves third-party rights). Yet the Court's lowest common denominator principle allows a limiting construction of an ambiguous statute prompted by constitutional doubts to infect other applications of the statute—even if the statute raises no constitutional doubt as applied to the specific litigant in a given case and even if the constitutionally unproblematic application of the statute to the litigant is severable from the constitutionally dubious applications. The lowest common denominator principle thus allows an end run around black-letter constitutional doctrine governing facial and as-applied constitutional challenges to statutes: A litigant ordinarily cannot attack statutes as constitutionally invalid based on constitutional doubts concerning other litigants or factual circumstances.

The Court misses the point by answering that the canon of constitutional avoidance "is not a method of adjudicating constitutional questions by other means," and that the canon rests on a presumption that "Congress did not intend the alternative which raises serious constitutional doubts." *Ante*, at 381. That is true, but in deciding whether a plausible interpretation "raises serious constitutional doubts," a court must employ the usual rules of constitutional adju-

dication. See *ante*, at 380–381 (noting that whether an interpretation is constitutionally doubtful turns on whether it raises "a multitude of constitutional problems"); *Zadvydas*, 533 U. S., at 690–696 (extensively employing constitutional analysis). Those rules include doctrines governing third-party constitutional challenges and the like. Moreover, the reason that courts perform avoidance at all, in any form, is that we assume "Congress intends statutes to have effect to the full extent the Constitution allows." *United States* v. *Booker*, *ante*, at 320 (THOMAS, J., dissenting in part). Only my approach would extend § 1231(a)(6) to its full constitutional bound consistent with modern avoidance, by narrowing the statute on a case-by-case basis only if constitutional concerns are actually present. By contrast, under the majority's lowest common denominator principle, a statute like § 1231(a)(6) must be narrowed once and for all based on constitutional concerns that may never materialize. In short, once narrowed in *Zadvydas*, § 1231(a)(6) now limits the Executive's power to detain unadmitted aliens—even though indefinite detention of unadmitted aliens may be perfectly constitutional.

All of this shows why the sole support the majority offers for its lowest common denominator principle can be squared with my analysis. That support is a plurality opinion of this Court (reaffirmed by footnote dictum in *Leocal* v. *Ashcroft*, *ante*, at 11–12, n. 8), that stated that the rule of lenity applies to statutes so long as they have some criminal applications. *Ante*, at 380 (citing *United States* v. *Thompson/Center Arms Co.*, 504 U. S. 505, 517 (1992)). To the extent that the rule of lenity is a constitutionally based clear statement rule, it is like vagueness doctrine, as its purpose is to ensure that those subjected to criminal prosecution have adequate notice of the conduct that the law prohibits. Cf., *e. g.*, *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931). *Thompson/Center Arms* is thus distinguishable, because our rules governing third-

party challenges (rightly or wrongly) are more lenient in vagueness cases.[3] *Zadvydas*, by contrast, was a straightforward as-applied constitutional challenge. It concerned a constitutional doubt that arose from § 1231(a)(6)'s application to the respondents there, not its hypothetical application to other aliens, as its careful distinction between admitted and inadmissible aliens shows. To the extent that the rule of lenity is a nonconstitutionally based presumption about the interpretation of criminal statutes, the *Thompson/Center Arms* interpretive principle is fundamentally different from the canon of constitutional avoidance, because the rule of lenity is wholly independent of the rules governing constitutional adjudication. Either way, this case does not support the majority's restatement of modern avoidance principles.

The cases at bar illustrate well the exception to the normal operation of as-applied constitutional adjudication that the Court's approach creates. Congress explicitly provided that unconstitutional applications of § 1231(a)(6) should be severed from constitutional applications.[4] Congress has thus indicated that courts should examine whether § 1231(a)(6) raises a constitutional doubt application by application. After all, under the severability clause, if *Zadvydas* had held unconstitutional the indefinite detention of respondents Zadvydas and Ma, the constitutionality of the Secretary's indefinite detention of Benitez and Martinez would remain an open question. Although *Zadvydas* did not formally hold § 1231(a)(6) to be unconstitutional as applied to the aliens before it, the same procedure should be followed when analyz-

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[3] See, *e. g.*, *Chicago* v. *Morales*, 527 U. S. 41, 55, and n. 22 (1999) (plurality opinion); *Kolender* v. *Lawson*, 461 U. S. 352, 358–359, n. 8 (1983); *Papachristou* v. *Jacksonville*, 405 U. S. 156 (1972).

[4] "If any provision of this division . . . or the application of such provision to any person or circumstances is held to be unconstitutional, the remainder of this division and the application of the provisions of this division to any person or circumstance shall not be affected thereby." Note following 8 U. S. C. § 1101, p. 840 (separability).

ing whether § 1231(a)(6) raises a constitutional doubt.[5] The Court today limits applications of § 1231(a)(6) that may well be constitutional solely on the basis of constitutional doubts as to *other* applications, and despite that the severability clause contemplates application-by-application examination of the statute's constitutionality.

The Court misapprehends my interpretive approach. It suggests that I would "spare [us] the necessity of ever finding a statute unconstitutional as applied," *ante*, at 384, and "would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case," *ante*, at 382. My approach does none of this. I simply would read ambiguous statutes to avoid as-applied constitutional doubts only if those doubts are present in the case before the Court. This leaves plenty of room for as-applied invalidation of statutes that are unambiguously unconstitutional. Nor would I permit a court to read every statute's meaning to depend on constitutional concerns. That is permissible, in my view, only if the statute is ambiguous. Granted, I am thereby guilty of leaving courts free to interpret ambiguous statutes "as becoming inoperative when they 'approach constitutional limits.'" *Ante*, at 384. That is hardly an absurd result—unless one considers the modern canon of constitutional

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[5] *Crowell* v. *Benson*, 285 U. S. 22 (1932), bolsters my approach. Employing the canon of avoidance, the Court construed a statute in that case to allow judicial review of jurisdictional facts but not legislative facts. It did so even though the terms of the statute itself did not distinguish between the two sorts of facts. *Id.*, at 62–63. The presence of a severability provision in the statute gave "assurance that there [was] no violation of the purpose of the Congress in sustaining the determinations of fact of the deputy commissioner where he acts within his authority in passing upon compensation claims while denying finality to his conclusions as to the jurisdictional facts upon which the valid application of the statute depends." *Ibid.* So too here, the presence of a severability provision should reassure the Court that applying *Zadvydas*' limiting construction of § 1231(a)(6) to some aliens and not others is consistent with the statute.

avoidance itself to be absurd. Every application of that canon, by rejecting a plausible interpretation of a statute, reads the statute to be inoperative to the extent it raises a constitutional doubt or "limit."

In truth, the Court's aggressive application of modern constitutional avoidance doctrine poses the greater danger. A disturbing number of this Court's cases have applied the canon of constitutional doubt to statutes that were on their face clear. See, *e. g.*, *INS* v. *St. Cyr*, 533 U. S. 289, 327–336 (2001) (SCALIA, J., dissenting); *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 481–482 (1989) (KENNEDY, J., concurring in judgment); *Lowe* v. *SEC*, 472 U. S. 181, 212–213 (1985) (White, J., concurring in result). This Court and others may now employ the "lowest common denominator" approach to limit the application of statutes wholesale by searching for hypothetical unconstitutional applications of them—or, worse yet, hypothetical constitutional *doubts*—despite the absence of any facial constitutional problem (at least, so long as those hypothetical doubts pose "a multitude of constitutional problems," *ante*, at 380–381). This is so even if Congress has expressed its clear intent that unconstitutional applications should be severed from constitutional applications, regardless of whether the challenger has third-party standing to raise the constitutional issue, and without the need to engage in full-fledged constitutional analysis.

This danger is real. In *St. Cyr*, this Court held that the Immigration and Nationality Act (INA) did not divest district courts of jurisdiction under 28 U. S. C. § 2241 over habeas actions filed by criminal aliens to challenge removal orders, 533 U. S., at 314. The Court did so because it thought that otherwise the statute would preclude any avenue of judicial review of removal orders of criminal aliens, thus raising a serious Suspension Clause question. *Id.*, at 305. This was a construction of (among other provisions) 8 U. S. C. §§ 1252(a)(1) and 1252(b)(9), and 28 U. S. C. § 2241, none of which distinguishes between criminal and noncriminal

aliens. 533 U. S., at 308–314. The INA, however, clearly allows noncriminal aliens, unlike criminal aliens, a right to judicial review of removal decisions in the courts of appeals under the review provisions of § 1252(a)(1), and *St. Cyr* involved only criminal aliens. After *St. Cyr*, therefore, one would have thought that "noncriminal aliens seeking to challenge their removal orders . . . [would] still presumably be required to proceed directly to the court of appeals by way of petition for review, under the restrictive modified Hobbs Act review provisions set forth in § 1252(a)(1)," rather than sue directly under the habeas statute. *Id.*, at 335 (SCALIA, J., joined by REHNQUIST, C. J., and O'CONNOR and THOMAS, JJ., dissenting). Yet lower courts, relying on a version of the Court's "lowest common denominator" principle, have held just the opposite: They have entertained noncriminal aliens' habeas actions challenging removal orders. *Chmakov* v. *Blackman*, 266 F. 3d 210, 214–215 (CA3 2001); see also *Riley* v. *INS*, 310 F. 3d 1253, 1256 (CA10 2002); *Liu* v. *INS*, 293 F. 3d 36, 38–41 (CA2 2002). The logic in allowing noncriminal aliens, who have a right to judicial review of removal decisions, to take advantage of constitutional doubt that arises from precluding any avenue of judicial review for criminal aliens, see *St. Cyr*, *supra*, at 305, escapes me.

II

The Court is also mistaken in affording *Zadvydas stare decisis* effect. *Zadvydas* was wrong in both its statutory and its constitutional analysis for the reasons expressed well by the dissents in that case. See 533 U. S., at 705–718 (opinion of KENNEDY, J.); *id.*, at 702–705 (opinion of SCALIA, J.). I continue to adhere to those views and will not repeat the analysis of my colleagues. I write only to explain why I do not consider *Zadvydas* to bind us.

Zadvydas cast itself as a statutory case, but that fact should not prevent us from overruling it. It is true that we give stronger *stare decisis* effect to our holdings in statutory

cases than in constitutional cases. See, *e. g.*, *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 205 (1991). This rule, however, is not absolute, and we should not hesitate to allow our precedent to yield to the true meaning of an Act of Congress when our statutory precedent is "unworkable" or "badly reasoned." *Holder* v. *Hall*, 512 U. S. 874, 936 (1994) (THOMAS, J., concurring in judgment) (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991); internal quotation marks omitted). "[W]e have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes." *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 695 (1978). The mere fact that Congress can overturn our cases by statute is no excuse for failing to overrule a statutory precedent of ours that is clearly wrong, for the realities of the legislative process often preclude readopting the original meaning of a statute that we have upset.

Zadvydas' reading of § 1231(a)(6) is untenable. Section 1231(a)(6) provides that aliens whom the Secretary of Homeland Security has ordered removed "may be detained beyond the removal period." There is no qualification to this authorization, and no reference to a "reasonable time" limitation. Just as we exhaust the aid of the "traditional tools of statutory construction," *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9 (1984), before deferring to an agency's interpretation of a statute, so too should we exhaust those tools before deciding that a statute is ambiguous and that an alternative plausible construction of the statute should be adopted.

Application of those traditional tools begins and ends with the text of § 1231(a)(6). *Zadvydas'* observation that "if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms," 533 U. S., at 697, proves nothing. Congress could have spoken more clearly in any statutory case in which the statute does not mention the particular factual scenario be-

fore the Court. Congress provided for a "reasonable time" limit to detentions pending removal in other portions of § 1231. *Id.*, at 708 (KENNEDY, J., dissenting). Its failure to do the same in § 1231(a)(6) confirms what is unmistakable from its terms: that there is no time limit on the Secretary's power to detain aliens. There is no textually evident alternative construction that would avoid the constitutional doubts identified by the majority.

Even apart from the Court's incredible reading of § 1231(a)(6), the normal reason for affording our statutory holdings strong *stare decisis* effect—that Congress is free to overrule them if it disagrees—does not apply to *Zadvydas*. *Zadvydas* is a statutory case in name only. Although the *Zadvydas* majority purported to find indefinite detention only constitutionally doubtful, its lengthy analysis strongly signaled to Congress that indefinite detention of admitted aliens would be unconstitutional. Indeed, far from avoiding that constitutional question in *Zadvydas*, the Court took it head on, giving it extended treatment. *Id.*, at 690–697; but see *ante*, at 381 (noting the "fundamenta[l]" tenet that "[t]he canon [of constitutional avoidance] is not a method of adjudicating constitutional questions by other means"). *Zadvydas* makes clear that the Court thought indefinite detention to be more than constitutionally suspect, and there is evidence that some Members of Congress understood as much.[6] This is why the Court's assurance that if "the security of our bor-

[6] See H. R. Conf. Rep. No. 108–10, p. 600 (2003) ("A recent Supreme Court decision held that criminal aliens cannot be detained indefinitely," no doubt referring to *Zadvydas*); H. R. Rep. No. 108–724, pt. 5, p. 191 (2004) ("The danger posed by the requirement that these aliens be allowed to remain in the U. S. was increased exponentially by the 2001 Supreme Court decision of *Zadvydas* v. *Davis*, in which the Court made clear that it would strike down as unconstitutional the indefinite detention by [the Secretary] of aliens with removal orders whose countries will not take them back, except in the most narrow of circumstances" (footnote omitted)); 147 Cong. Rec. 20729 (2001) ("Indefinite detention of aliens is permitted only in extraordinary circumstances," citing *Zadvydas*).

ders will be compromised if [the United States] must release into the country inadmissible aliens who cannot be removed[,] Congress can attend to it," *ante*, at 386, rings hollow. Short of constitutional amendment, it is only within the power of this Court to correct *Zadvydas*' error.

The Court points to 8 U. S. C. § 1226a(a)(6) (2000 ed., Supp. II), a statute that Congress passed shortly after *Zadvydas*, as evidence that Congress can correct *Zadvydas*' mistake. *Ante*, at 386, n. 8. This statute only confirms my concern that *Zadvydas* is legislatively uncorrectable. Section 1226a(a)(6) authorizes detention for a period of six months beyond the removal period of aliens who present a national security threat, but only to the extent that those aliens' removal is not reasonably foreseeable. *Ante*, at 386, n. 8. Yet *Zadvydas* conceded that indefinite detention might not violate due process in "certain special and narrow nonpunitive circumstances . . . where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." 533 U. S., at 690 (internal quotation marks omitted). Moreover, *Zadvydas* set a 6-month presumptive outer limit on the detention power. *Id.*, at 701. Congress crafted § 1226a(a)(6) to operate within the boundaries *Zadvydas* set. This provision says nothing about whether Congress may authorize detention of aliens for greater lengths of time or for reasons the Court found constitutionally problematic in *Zadvydas*.

* * *

For the foregoing reasons, I would affirm the judgment of the Eleventh Circuit and reverse the judgment of the Ninth Circuit. I therefore respectfully dissent.

Syllabus

ILLINOIS *v.* CABALLES

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 03–923. Argued November 10, 2004—Decided January 24, 2005

After an Illinois state trooper stopped respondent for speeding and radioed in, a second trooper, overhearing the transmission, drove to the scene with his narcotics-detection dog and walked the dog around respondent's car while the first trooper wrote respondent a warning ticket. When the dog alerted at respondent's trunk, the officers searched the trunk, found marijuana, and arrested respondent. At respondent's drug trial, the court denied his motion to suppress the seized evidence, holding, *inter alia*, that the dog's alerting provided sufficient probable cause to conduct the search. Respondent was convicted, but the Illinois Supreme Court reversed, finding that because there were no specific and articulable facts to suggest drug activity, use of the dog unjustifiably enlarged a routine traffic stop into a drug investigation.

Held: A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment. Pp. 407–410.

207 Ill. 2d 504, 802 N. E. 2d 202, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, THOMAS, and BREYER, JJ., joined. SOUTER, J., filed a dissenting opinion, *post*, p. 410. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 417. REHNQUIST, C. J., took no part in the decision of the case.

Lisa Madigan, Attorney General of Illinois, argued the cause for petitioner. With her on the briefs were *Gary Feinerman*, Solicitor General, and *Linda D. Woloshin* and *Mary Fleming*, Assistant Attorneys General.

Assistant Attorney General Wray argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Solicitor General Olson*, *Deputy Solicitor General Dreeben*, *James A. Feldman*, and *John A. Drennan*.

Ralph E. Meczyk argued the cause for respondent. With him on the brief was *Lawrence H. Hyman.**

JUSTICE STEVENS delivered the opinion of the Court.

Illinois State Trooper Daniel Gillette stopped respondent for speeding on an interstate highway. When Gillette radioed the police dispatcher to report the stop, a second trooper, Craig Graham, a member of the Illinois State Police Drug Interdiction Team, overheard the transmission and immediately headed for the scene with his narcotics-detection dog. When they arrived, respondent's car was on the shoulder of the road and respondent was in Gillette's vehicle. While Gillette was in the process of writing a warning ticket, Graham walked his dog around respondent's car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested respondent. The entire incident lasted less than 10 minutes.

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*Briefs of *amici curiae* urging reversal were filed for the State of Arkansas et al. by *Mike Beebe*, Attorney General of Arkansas, *Lauren Elizabeth Heil*, Assistant Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Christopher L. Morano* of Connecticut, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *Charles C. Foti* of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Michael A. Cox* of Michigan, *Jon Bruning* of Nebraska, *Peter C. Harvey* of New Jersey, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *Hardy Myers* of Oregon, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Jerry Kilgore* of Virginia, and *Patrick J. Crank* of Wyoming; and for the Illinois Association of Chiefs of Police et al. by *James G. Sotos.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Barry Sullivan, Jacob I. Corré, Steven R. Shapiro*, and *Harvey Grossman;* and for the National Association of Criminal Defense Lawyers by *Jeffrey T. Green, John Wesley Hall, Jr.*, and *David M. Siegel.*

Respondent was convicted of a narcotics offense and sentenced to 12 years' imprisonment and a $256,136 fine. The trial judge denied his motion to suppress the seized evidence and to quash his arrest. He held that the officers had not unnecessarily prolonged the stop and that the dog alert was sufficiently reliable to provide probable cause to conduct the search. Although the Appellate Court affirmed, the Illinois Supreme Court reversed, concluding that because the canine sniff was performed without any "'specific and articulable facts'" to suggest drug activity, the use of the dog "unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation." 207 Ill. 2d 504, 510, 802 N. E. 2d 202, 205 (2003).

The question on which we granted certiorari, 541 U. S. 972 (2004), is narrow: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." Pet. for Cert. i. Thus, we proceed on the assumption that the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding; accordingly, we have omitted any reference to facts about respondent that might have triggered a modicum of suspicion.

Here, the initial seizure of respondent when he was stopped on the highway was based on probable cause and was concededly lawful. It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. *United States* v. *Jacobsen*, 466 U. S. 109, 124 (1984). A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. In an earlier case involving a dog sniff that occurred during an unreasonably prolonged traffic stop, the Illinois Supreme Court held that use of the dog and the subsequent discovery

of contraband were the product of an unconstitutional seizure. *People* v. *Cox*, 202 Ill. 2d 462, 782 N. E. 2d 275 (2002). We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained.

In the state-court proceedings, however, the judges carefully reviewed the details of Officer Gillette's conversations with respondent and the precise timing of his radio transmissions to the dispatcher to determine whether he had improperly extended the duration of the stop to enable the dog sniff to occur. We have not recounted those details because we accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop.

Despite this conclusion, the Illinois Supreme Court held that the initially lawful traffic stop became an unlawful seizure solely as a result of the canine sniff that occurred outside respondent's stopped car. That is, the court characterized the dog sniff as the cause rather than the consequence of a constitutional violation. In its view, the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation, and because the shift in purpose was not supported by any reasonable suspicion that respondent possessed narcotics, it was unlawful. In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not.

Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. *Jacobsen*, 466 U. S., at 123. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that *only* reveals the possession of contraband "compromises no legitimate privacy interest." *Ibid.* This is because the expecta-

tion "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." *Id.*, at 122 (punctuation omitted). In *United States* v. *Place*, 462 U. S. 696 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as *"sui generis"* because it "discloses only the presence or absence of narcotics, a contraband item." *Id.*, at 707; see also *Indianapolis* v. *Edmond*, 531 U. S. 32, 40 (2000). Respondent likewise concedes that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband." Brief for Respondent 17. Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument. Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.

Accordingly, the use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place*, 462 U. S., at 707—during a lawful traffic stop generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo* v. *United States*, 533 U. S. 27 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a

home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.*, at 38. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

The judgment of the Illinois Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

JUSTICE SOUTER, dissenting.

I would hold that using the dog for the purposes of determining the presence of marijuana in the car's trunk was a search unauthorized as an incident of the speeding stop and unjustified on any other ground. I would accordingly affirm the judgment of the Supreme Court of Illinois, and I respectfully dissent.

In *United States* v. *Place*, 462 U. S. 696 (1983), we categorized the sniff of the narcotics-seeking dog as "*sui generis*" under the Fourth Amendment and held it was not a search. *Id.*, at 707. The classification rests not only upon the limited nature of the intrusion, but on a further premise that experience has shown to be untenable, the assumption that trained sniffing dogs do not err. What we have learned about the fallibility of dogs in the years since *Place* was decided would itself be reason to call for reconsidering *Place*'s decision against treating the intentional use of a trained dog as a search. The portent of this very case, however, adds insist-

ence to the call, for an uncritical adherence to *Place* would render the Fourth Amendment indifferent to suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks; if a sniff is not preceded by a seizure subject to Fourth Amendment notice, it escapes Fourth Amendment review entirely unless it is treated as a search. We should not wait for these developments to occur before rethinking *Place*'s analysis, which invites such untoward consequences.[1]

At the heart both of *Place* and the Court's opinion today is the proposition that sniffs by a trained dog are *sui generis* because a reaction by the dog in going alert is a response to nothing but the presence of contraband.[2] See *ibid.* ("[T]he sniff discloses only the presence or absence of narcotics, a contraband item"); *ante*, at 409 (assuming that "a canine sniff by a well-trained narcotics-detection dog" will only reveal "'the presence or absence of narcotics, a contraband item'" (quoting *Place*, *supra*, at 707)). Hence, the argument goes, because the sniff can only reveal the presence of items devoid of any legal use, the sniff "does not implicate legitimate privacy interests" and is not to be treated as a search. *Ante*, at 409.

The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether

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[1] I also join JUSTICE GINSBURG's dissent, *post*, p. 417. Without directly reexamining the soundness of the Court's analysis of government dog sniffs in *Place*, she demonstrates that investigation into a matter beyond the subject of the traffic stop here offends the rule in *Terry* v. *Ohio*, 392 U. S. 1 (1968), the analysis I, too, adopt.

[2] Another proffered justification for *sui generis* status is that a dog sniff is a particularly nonintrusive procedure. *United States* v. *Place*, 462 U. S. 696, 707 (1983). I agree with JUSTICE GINSBURG that the introduction of a dog to a traffic stop (let alone an encounter with someone walking down the street) can in fact be quite intrusive. *Post*, at 421–422.

owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. See, *e. g.*, *United States* v. *Kennedy*, 131 F. 3d 1371, 1378 (CA10 1997) (describing a dog that had a 71% accuracy rate); *United States* v. *Scarborough*, 128 F. 3d 1373, 1378, n. 3 (CA10 1997) (describing a dog that erroneously alerted 4 times out of 19 while working for the postal service and 8% of the time over its entire career); *United States* v. *Limares*, 269 F. 3d 794, 797 (CA7 2001) (accepting as reliable a dog that gave false positives between 7% and 38% of the time); *Laime* v. *State*, 347 Ark. 142, 159, 60 S. W. 3d 464, 476 (2001) (speaking of a dog that made between 10 and 50 errors); *United States* v. *$242,484.00*, 351 F. 3d 499, 511 (CA11 2003) (noting that because as much as 80% of all currency in circulation contains drug residue, a dog alert "is of little value"), vacated on other grounds by rehearing en banc, 357 F. 3d 1225 (CA11 2004); *United States* v. *Carr*, 25 F. 3d 1194, 1214–1217 (CA3 1994) (Becker, J., concurring in part and dissenting in part) ("[A] substantial portion of United States currency . . . is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence"). Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are "generally reliable" shows that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search. See Reply Brief for Petitioner 13; Federal Aviation Admin., K. Garner et al., Duty Cycle of the Detector Dog: A Baseline Study 12 (Apr. 2001) (prepared by Auburn U. Inst. for Biological Detection Systems). In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times.

Once the dog's fallibility is recognized, however, that ends the justification claimed in *Place* for treating the sniff as *sui generis* under the Fourth Amendment: the sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has

sensed will not necessarily reveal contraband or any other evidence of crime. This is not, of course, to deny that a dog's reaction may provide reasonable suspicion, or probable cause, to search the container or enclosure; the Fourth Amendment does not demand certainty of success to justify a search for evidence or contraband. The point is simply that the sniff and alert cannot claim the certainty that *Place* assumed, both in treating the deliberate use of sniffing dogs as *sui generis* and then taking that characterization as a reason to say they are not searches subject to Fourth Amendment scrutiny. And when that aura of uniqueness disappears, there is no basis in *Place*'s reasoning, and no good reason otherwise, to ignore the actual function that dog sniffs perform. They are conducted to obtain information about the contents of private spaces beyond anything that human senses could perceive, even when conventionally enhanced. The information is not provided by independent third parties beyond the reach of constitutional limitations, but gathered by the government's own officers in order to justify searches of the traditional sort, which may or may not reveal evidence of crime but will disclose anything meant to be kept private in the area searched. Thus in practice the government's use of a trained narcotics dog functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area. And given the fallibility of the dog, the sniff is the first step in a process that may disclose "intimate details" without revealing contraband, just as a thermal-imaging device might do, as described in *Kyllo* v. *United States*, 533 U. S. 27 (2001).[3]

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[3] *Kyllo* was concerned with whether a search occurred when the police used a thermal-imaging device on a house to detect heat emanations associated with high-powered marijuana-growing lamps. In concluding that using the device was a search, the Court stressed that the "Government [may not] us[e] a device . . . to explore details of the home that would previously have been unknowable without physical intrusion." 533 U. S.,

It makes sense, then, to treat a sniff as the search that it amounts to in practice, and to rely on the body of our Fourth Amendment cases, including *Kyllo*, in deciding whether such a search is reasonable. As a general proposition, using a dog to sniff for drugs is subject to the rule that the object of enforcing criminal laws does not, without more, justify suspicionless Fourth Amendment intrusions. See *Indianapolis* v. *Edmond*, 531 U. S. 32, 41–42 (2000). Since the police claim to have had no particular suspicion that Caballes was violating any drug law,[4] this sniff search must stand or fall on its being ancillary to the traffic stop that led up to it. It is true that the police had probable cause to stop the car for an offense committed in the officer's presence, which Caballes concedes could have justified his arrest. See Brief for Respondent 31. There is no occasion to consider authority incident to arrest, however, see *Knowles* v. *Iowa*, 525 U. S. 113 (1998), for the police did nothing more than detain Caballes long enough to check his record and write a ticket. As a consequence, the reasonableness of the search must be assessed in relation to the actual delay the police chose to impose, and as JUSTICE GINSBURG points out in her opinion, *post*, at 419–420, the Fourth Amendment consequences of stopping for a traffic citation are settled law.

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at 40. Any difference between the dwelling in *Kyllo* and the trunk of the car here may go to the issue of the reasonableness of the respective searches, but it has no bearing on the question of search or no search. Nor is it significant that *Kyllo*'s imaging device would disclose personal details immediately, whereas they would be revealed only in the further step of opening the enclosed space following the dog's alert reaction; in practical terms the same values protected by the Fourth Amendment are at stake in each case. The justifications required by the Fourth Amendment may or may not differ as between the two practices, but if constitutional scrutiny is in order for the imager, it is in order for the dog.

[4] Despite the remarkable fact that the police pulled over a car for going 71 miles an hour on I–80, the State maintains that excessive speed was the only reason for the stop, and the case comes to us on that assumption.

In *Berkemer* v. *McCarty*, 468 U. S. 420, 439–440 (1984), followed in *Knowles*, *supra*, at 117, we held that the analogue of the common traffic stop was the limited detention for investigation authorized by *Terry* v. *Ohio*, 392 U. S. 1 (1968). While *Terry* authorized a restricted incidental search for weapons when reasonable suspicion warrants such a safety measure, *id.*, at 25–26, the Court took care to keep a *Terry* stop from automatically becoming a foot in the door for all investigatory purposes; the permissible intrusion was bounded by the justification for the detention, *id.*, at 29–30.[5] Although facts disclosed by enquiry within this limit might give grounds to go further, the government could not otherwise take advantage of a suspect's immobility to search for evidence unrelated to the reason for the detention. That has to be the rule unless *Terry* is going to become an open sesame for general searches, and that rule requires holding that the police do not have reasonable grounds to conduct sniff searches for drugs simply because they have stopped someone to receive a ticket for a highway offense. Since the police had no indication of illegal activity beyond the speed of the car in this case, the sniff search should be held unreasonable under the Fourth Amendment and its fruits should be suppressed.

Nothing in the case relied upon by the Court, *United States* v. *Jacobsen*, 466 U. S. 109 (1984), unsettled the limit of reasonable enquiry adopted in *Terry*. In *Jacobsen*, the Court found that no Fourth Amendment search occurred when federal agents analyzed powder they had already lawfully obtained. The Court noted that because the test could only reveal whether the powder was cocaine, the owner had no legitimate privacy interest at stake. 466 U. S., at 123.

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[5] Thus, in *Place* itself, the Government officials had independent grounds to suspect that the luggage in question contained contraband before they employed the dog sniff. 462 U. S., at 698 (describing how Place had acted suspiciously in line at the airport and had labeled his luggage with inconsistent and fictional addresses).

As already explained, however, the use of a sniffing dog in cases like this is significantly different and properly treated as a search that does indeed implicate Fourth Amendment protection.

In *Jacobsen*, once the powder was analyzed, that was effectively the end of the matter: either the powder was cocaine, a fact the owner had no legitimate interest in concealing, or it was not cocaine, in which case the test revealed nothing about the powder or anything else that was not already legitimately obvious to the police. But in the case of the dog sniff, the dog does not smell the disclosed contraband; it smells a closed container. An affirmative reaction therefore does not identify a substance the police already legitimately possess, but informs the police instead merely of a reasonable chance of finding contraband they have yet to put their hands on. The police will then open the container and discover whatever lies within, be it marijuana or the owner's private papers. Thus, while *Jacobsen* could rely on the assumption that the enquiry in question would either show with certainty that a known substance was contraband or would reveal nothing more, both the certainty and the limit on disclosure that may follow are missing when the dog sniffs the car.[6]

[6] It would also be error to claim that some variant of the plain-view doctrine excuses the lack of justification for the dog sniff in this case. When an officer observes an object left by its owner in plain view, no search occurs because the owner has exhibited "no intention to keep [the object] to himself." *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring). In contrast, when an individual conceals his possessions from the world, he has grounds to expect some degree of privacy. While plain view may be enhanced somewhat by technology, see, *e. g.*, *Dow Chemical Co.* v. *United States*, 476 U. S. 227 (1986) (allowing for aerial surveillance of an industrial complex), there are limits. As *Kyllo* v. *United States*, 533 U. S. 27, 33 (2001), explained in treating the thermal-imaging device as outside the plain-view doctrine, "[w]e have previously reserved judgment as to how much technological enhancement of ordinary perception" turns mere observation into a Fourth Amendment search. While *Kyllo* laid special emphasis on the heightened privacy expectations

The Court today does not go so far as to say explicitly that sniff searches by dogs trained to sense contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dog's walk around a stopped car, *ante*, at 409. For this reason, I do not take the Court's reliance on *Jacobsen* as actually signaling recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car, about which JUSTICE GINSBURG is rightly concerned, *post*, at 422, or on the person of any pedestrian minding his own business on a sidewalk. But the Court's stated reasoning provides no apparent stopping point short of such excesses. For the sake of providing a workable framework to analyze cases on facts like these, which are certain to come along, I would treat the dog sniff as the familiar search it is in fact, subject to scrutiny under the Fourth Amendment.[7]

JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.

Illinois State Police Trooper Daniel Gillette stopped Roy Caballes for driving 71 miles per hour in a zone with a posted

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that surround the home, closed car trunks are accorded some level of privacy protection. See, *e. g.*, *New York* v. *Belton*, 453 U. S. 454, 460, n. 4 (1981) (holding that even a search incident to arrest in a vehicle does not itself permit a search of the trunk). As a result, if Fourth Amendment protections are to have meaning in the face of superhuman, yet fallible, techniques like the use of trained dogs, those techniques must be justified on the basis of their reasonableness, lest everything be deemed in plain view.

[7] I should take care myself to reserve judgment about a possible case significantly unlike this one. All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion. Suffice it to say here that what is a reasonable search depends in part on demonstrated risk. Unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk.

speed limit of 65 miles per hour. Trooper Craig Graham of the Drug Interdiction Team heard on the radio that Trooper Gillette was making a traffic stop. Although Gillette requested no aid, Graham decided to come to the scene to conduct a dog sniff. Gillette informed Caballes that he was speeding and asked for the usual documents—driver's license, car registration, and proof of insurance. Caballes promptly provided the requested documents but refused to consent to a search of his vehicle. After calling his dispatcher to check on the validity of Caballes' license and for outstanding warrants, Gillette returned to his vehicle to write Caballes a warning ticket. Interrupted by a radio call on an unrelated matter, Gillette was still writing the ticket when Trooper Graham arrived with his drug-detection dog. Graham walked the dog around the car, the dog alerted at Caballes' trunk, and, after opening the trunk, the troopers found marijuana. 207 Ill. 2d 504, 506–507, 802 N. E. 2d 202, 203 (2003).

The Supreme Court of Illinois held that the drug evidence should have been suppressed. *Id.*, at 506, 802 N. E. 2d, at 202. Adhering to its decision in *People* v. *Cox*, 202 Ill. 2d 462, 782 N. E. 2d 275 (2002), the court employed a two-part test taken from *Terry* v. *Ohio*, 392 U. S. 1 (1968), to determine the overall reasonableness of the stop. 207 Ill. 2d, at 508, 802 N. E. 2d, at 204. The court asked first "whether the officer's action was justified at its inception," and second "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Ibid.* (quoting *People* v. *Brownlee*, 186 Ill. 2d 501, 518–519, 713 N. E. 2d 556, 565 (1999) (in turn quoting *Terry*, 392 U. S., at 19–20)). "[I]t is undisputed," the court observed, "that the traffic stop was properly initiated"; thus, the dispositive inquiry trained on the "second part of the *Terry* test," in which "[t]he State bears the burden of establishing that the conduct remained within the scope of the stop." 207 Ill. 2d, at 509, 802 N. E. 2d, at 204.

The court concluded that the State failed to offer sufficient justification for the canine sniff: "The police did not detect the odor of marijuana in the car or note any other evidence suggesting the presence of illegal drugs." *Ibid.* Lacking "specific and articulable facts" supporting the canine sniff, *ibid.* (quoting *Cox*, 202 Ill. 2d, at 470–471, 782 N. E. 2d, at 281), the court ruled, "the police impermissibly broadened the scope of the traffic stop in this case into a drug investigation." 207 Ill. 2d, at 509, 802 N. E. 2d, at 204.[1] I would affirm the Illinois Supreme Court's judgment and hold that the drug sniff violated the Fourth Amendment.

In *Terry* v. *Ohio*, the Court upheld the stop and subsequent frisk of an individual based on an officer's observation of suspicious behavior and his reasonable belief that the suspect was armed. See 392 U. S., at 27–28. In a *Terry*-type investigatory stop, "the officer's action [must be] justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*, at 20. In applying *Terry*, the Court has several times indicated that the limitation on "scope" is not confined to the duration of the seizure; it also encompasses the manner in which the seizure is conducted. See, *e. g.*, *Hiibel* v. *Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U. S. 177, 188 (2004) (an officer's request that an individual identify himself "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop"); *United States* v. *Hensley*, 469 U. S. 221, 235 (1985) (examining, under *Terry*,

[1] The Illinois Supreme Court held insufficient to support a canine sniff Gillette's observations that (1) Caballes said he was moving to Chicago, but his only visible belongings were two sport coats in the backseat; (2) the car smelled of air freshener; (3) Caballes was dressed for business, but was unemployed; and (4) Caballes seemed nervous. Even viewed together, the court said, these observations gave rise to "nothing more than a vague hunch" of "possible wrongdoing." 207 Ill. 2d 504, 509–510, 802 N. E. 2d 202, 204–205 (2003). This Court proceeds on "the assumption that the officer conducting the dog sniff had no information about [Caballes]." *Ante*, at 407.

both "the length and intrusiveness of the stop and detention"); *Florida* v. *Royer*, 460 U. S. 491, 500 (1983) (plurality opinion) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop [and] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion . . . .").

"A routine traffic stop," the Court has observed, "is a relatively brief encounter and 'is more analogous to a so-called *Terry* stop . . . than to a formal arrest.'" *Knowles* v. *Iowa*, 525 U. S. 113, 117 (1998) (quoting *Berkemer* v. *McCarty*, 468 U. S. 420, 439 (1984)); see also *ante*, at 415 (SOUTER, J., dissenting) (The government may not "take advantage of a suspect's immobility to search for evidence unrelated to the reason for the detention.").[2] I would apply *Terry*'s reasonable-relation test, as the Illinois Supreme Court did, to determine whether the canine sniff impermissibly expanded the scope of the initially valid seizure of Caballes.

It is hardly dispositive that the dog sniff in this case may not have lengthened the duration of the stop. Cf. *ante*, at 407 ("A seizure . . . can become unlawful if it is prolonged beyond the time reasonably required to complete [the initial] mission."). *Terry*, it merits repetition, instructs that any investigation must be "reasonably related in *scope* to the circumstances which justified the interference in the first place." 392 U. S., at 20 (emphasis added). The unwar-

[2] The *Berkemer* Court cautioned that by analogizing a traffic stop to a *Terry* stop, it did "not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." 468 U. S., at 439, n. 29. This Court, however, looked to *Terry* earlier in deciding that an officer acted reasonably when he ordered a motorist stopped for driving with expired license tags to exit his car, *Pennsylvania* v. *Mimms*, 434 U. S. 106, 109–110 (1977) *(per curiam)*, and later reaffirmed the *Terry* analogy when evaluating a police officer's authority to search a vehicle during a routine traffic stop, *Knowles*, 525 U. S., at 117.

ranted and nonconsensual expansion of the seizure here from a routine traffic stop to a drug investigation broadened the scope of the investigation in a manner that, in my judgment, runs afoul of the Fourth Amendment.[3]

The Court rejects the Illinois Supreme Court's judgment and, implicitly, the application of *Terry* to a traffic stop converted, by calling in a dog, to a drug search. The Court so rules, holding that a dog sniff does not render a seizure that is reasonable in time unreasonable in scope. *Ante*, at 408. Dog sniffs that detect only the possession of contraband may be employed without offense to the Fourth Amendment, the Court reasons, because they reveal no lawful activity and hence disturb no legitimate expectation of privacy. *Ante*, at 408–409.

In my view, the Court diminishes the Fourth Amendment's force by abandoning the second *Terry* inquiry (was the police action "reasonably related in scope to the circumstances [justifiying] the [initial] interference"). 392 U. S., at 20. A drug-detection dog is an intimidating animal. Cf. *United States* v. *Williams*, 356 F. 3d 1268, 1276 (CA10 2004) (McKay, J., dissenting) ("drug dogs are not lap dogs"). Injecting such an animal into a routine traffic stop changes the character of the encounter between the police and the motorist. The stop becomes broader, more adversarial, and (in at least some cases) longer. Caballes—who, as far as Troopers Gillette and Graham knew, was guilty solely of driving six miles per hour over the speed limit—was exposed to the embarrassment and intimidation of being investigated, on a public thoroughfare, for drugs. Even if the drug sniff is not characterized as a Fourth Amendment "search," cf. *Indian-*

[3] The question whether a police officer inquiring about drugs without reasonable suspicion unconstitutionally broadens a traffic investigation is not before the Court. Cf. *Florida* v. *Bostick*, 501 U. S. 429, 434 (1991) (police questioning of a bus passenger, who might have just said "No," did not constitute a seizure).

apolis v. *Edmond*, 531 U. S. 32, 40 (2000); *United States* v. *Place*, 462 U. S. 696, 707 (1983), the sniff surely broadened the scope of the traffic-violation-related seizure.

The Court has never removed police action from Fourth Amendment control on the ground that the action is well calculated to apprehend the guilty. See, *e. g.*, *United States* v. *Karo*, 468 U. S. 705, 717 (1984) (Fourth Amendment warrant requirement applies to police monitoring of a beeper in a house even if "the facts [justify] believing that a crime is being or will be committed and that monitoring the beeper wherever it goes is likely to produce evidence of criminal activity."); see also *Minnesota* v. *Carter*, 525 U. S. 83, 110 (1998) (GINSBURG, J., dissenting) ("Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty."). Under today's decision, every traffic stop could become an occasion to call in the dogs, to the distress and embarrassment of the law-abiding population.

The Illinois Supreme Court, it seems to me, correctly apprehended the danger in allowing the police to search for contraband despite the absence of cause to suspect its presence. Today's decision, in contrast, clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots. Compare, *e. g.*, *United States* v. *Ludwig*, 10 F. 3d 1523, 1526–1527 (CA10 1993) (upholding a search based on a canine drug sniff of a parked car in a motel parking lot conducted without particular suspicion), with *United States* v. *Quinn*, 815 F. 2d 153, 159 (CA1 1987) (officers must have reasonable suspicion that a car contains narcotics at the moment a dog sniff is performed), and *Place*, 462 U. S., at 706–707 (Fourth Amendment not violated by a dog sniff of a piece of luggage that was seized, pre-sniff, based on suspicion of drugs). Nor would motorists have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green.

Today's decision also undermines this Court's situation-sensitive balancing of Fourth Amendment interests in other contexts. For example, in *Bond* v. *United States*, 529 U. S. 334, 338–339 (2000), the Court held that a bus passenger had an expectation of privacy in a bag placed in an overhead bin and that a police officer's physical manipulation of the bag constituted an illegal search. If canine drug sniffs are entirely exempt from Fourth Amendment inspection, a sniff could substitute for an officer's request to a bus passenger for permission to search his bag, with this significant difference: The passenger would not have the option to say "No."

The dog sniff in this case, it bears emphasis, was for drug detection only. A dog sniff for explosives, involving security interests not presented here, would be an entirely different matter. Detector dogs are ordinarily trained not as all-purpose sniffers, but for discrete purposes. For example, they may be trained for narcotics detection or for explosives detection or for agricultural products detection. See, *e. g.*, U. S. Customs & Border Protection, Canine Enforcement Training Center Training Program Course Descriptions, http://www.cbp.gov/xp/cgov/border_security/canines/training_program.xml (all Internet materials as visited Dec. 16, 2004, and available in Clerk of Court's case file) (describing Customs training courses in narcotics detection); Transportation Security Administration, Canine and Explosives Program, http://www.tsa.gov/public/display?theme=32 (describing Transportation Security Administration's explosives detection canine program); U. S. Dept. of Agriculture, Animal and Plant Health Inspection Service, USDA's Detector Dogs: Protecting American Agriculture (Oct. 2001), available at http://www.aphis.usda.gov/oa/pubs/detdogs.pdf (describing USDA Beagle Brigade detector dogs trained to detect prohibited fruits, plants, and meat); see also Jennings, Origins and History of Security and Detector Dogs, in Canine Sports Medicine and Surgery 16, 18–19 (M. Bloomberg, J. Dee, & R. Taylor eds. 1998) (describing narcotics-detector

dogs used by Border Patrol and Customs, and bomb detector dogs used by the Federal Aviation Administration and the Secret Service, but noting the possibility in some circumstances of cross training dogs for multiple tasks); S. Chapman, Police Dogs in North America 64, 70–79 (1990) (describing narcotics- and explosives-detection dogs and noting the possibility of cross training). There is no indication in this case that the dog accompanying Trooper Graham was trained for anything other than drug detection. See 207 Ill. 2d, at 507, 802 N. E. 2d, at 203 ("Trooper Graham arrived with his drug-detection dog . . . ."); Brief for Petitioner 3 ("Trooper Graham arrived with a drug-detection dog . . . .").

This Court has distinguished between the general interest in crime control and more immediate threats to public safety. In *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444 (1990), this Court upheld the use of a sobriety traffic checkpoint. Balancing the State's interest in preventing drunk driving, the extent to which that could be accomplished through the checkpoint program, and the degree of intrusion the stops involved, the Court determined that the State's checkpoint program was consistent with the Fourth Amendment. *Id.*, at 455. Ten years after *Sitz*, in *Indianapolis* v. *Edmond*, 531 U. S. 32, this Court held that a drug interdiction checkpoint violated the Fourth Amendment. Despite the illegal narcotics traffic that the Nation is struggling to stem, the Court explained, a "general interest in crime control" did not justify the stops. *Id.*, at 43–44 (internal quotation marks omitted). The Court distinguished the sobriety checkpoints in *Sitz* on the ground that those checkpoints were designed to eliminate an "immediate, vehicle-bound threat to life and limb." 531 U. S., at 43.

The use of bomb-detection dogs to check vehicles for explosives without doubt has a closer kinship to the sobriety checkpoints in *Sitz* than to the drug checkpoints in *Edmond*. As the Court observed in *Edmond*: "[T]he Fourth Amendment would almost certainly permit an appropriately tai-

lored roadblock set up to thwart an imminent terrorist attack . . . ." 531 U. S., at 44. Even if the Court were to change course and characterize a dog sniff as an independent Fourth Amendment search, see *ante*, p. 410 (SOUTER, J., dissenting), the immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine. See, *e. g.*, *ante*, at 417, n. 7 (SOUTER, J., dissenting); *Griffin* v. *Wisconsin*, 483 U. S. 868, 873 (1987) (permitting exceptions to the warrant and probable-cause requirements for a search when "special needs, beyond the normal need for law enforcement," make those requirements impracticable (quoting *New Jersey* v. *T. L. O.*, 469 U. S. 325, 351 (1985) (Blackmun, J., concurring in judgment))).

* * *

For the reasons stated, I would hold that the police violated Caballes' Fourth Amendment rights when, without cause to suspect wrongdoing, they conducted a dog sniff of his vehicle. I would therefore affirm the judgment of the Illinois Supreme Court.

Syllabus

COMMISSIONER OF INTERNAL REVENUE *v.* BANKS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03–892. Argued November 1, 2004—Decided January 24, 2005*

Respondent Banks settled his federal employment discrimination suit against a California state agency and respondent Banaitis settled his Oregon state case against his former employer, but neither included fees paid to their attorneys under contingent-fee agreements as gross income on their federal income tax returns. In each case petitioner Commissioner of Internal Revenue issued a notice of deficiency, which the Tax Court upheld. In Banks' case, the Sixth Circuit reversed in part, finding that the amount Banks paid to his attorney was not includable as gross income. In Banaitis' case, the Ninth Circuit found that because Oregon law grants attorneys a superior lien in the contingent-fee portion of any recovery, that part of Banaitis' settlement was not includable as gross income.

Held: When a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee. Pp. 432–439.

(a) Two preliminary observations help clarify why this issue is of consequence. First, taking the legal expenses as miscellaneous itemized deductions would have been of no help to respondents because the Alternative Minimum Tax establishes a tax liability floor and does not allow such deductions. Second, the American Jobs Creation Act of 2004—which amended the Internal Revenue Code to allow a taxpayer, in computing adjusted gross income, to deduct attorney's fees such as those at issue—does not apply here because it was passed after these cases arose and is not retroactive. Pp. 432–433.

(b) The Code defines "gross income" broadly to include all economic gains not otherwise exempted. Under the anticipatory assignment of income doctrine, a taxpayer cannot exclude an economic gain from gross income by assigning the gain in advance to another party, *e. g.*, *Lucas* v. *Earl*, 281 U. S. 111, because gains should be taxed "to those who earned them," *id.*, at 114. The doctrine is meant to prevent taxpayers from avoiding taxation through arrangements and contracts devised to pre-

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*Together with No. 03–907, *Commissioner of Internal Revenue* v. *Banaitis*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

vent income from vesting in the one who earned it. *Id.*, at 115. Because the rule is preventative and motivated by administrative and substantive concerns, this Court does not inquire whether any particular assignment has a discernible tax avoidance purpose. Pp. 433–434.

(c) The Court agrees with the Commissioner that a contingent-fee agreement should be viewed as an anticipatory assignment to the attorney of a portion of the client's income from any litigation recovery. In an ordinary case attribution of income is resolved by asking whether a taxpayer exercises complete dominion over the income in question. However, in the context of anticipatory assignments, where the assignor may not have dominion over the income at the moment of receipt, the question is whether the assignor retains dominion over the income-generating asset. Looking to such control preserves the principle that income should be taxed to the party who earns the income and enjoys the consequent benefits. In the case of a litigation recovery the income-generating asset is the cause of action derived from the plaintiff's legal injury. The plaintiff retains dominion over this asset throughout the litigation. Respondents' counterarguments are rejected. The legal claim's value may be speculative at the moment of the assignment, but the anticipatory assignment doctrine is not limited to instances when the precise dollar value of the assigned income is known in advance. In these cases, the taxpayer retained control over the asset, diverted some of the income produced to another party, and realized a benefit by doing so. Also rejected is respondents' suggestion that the attorney-client relationship be treated as a sort of business partnership or joint venture for tax purposes. In fact, that relationship is a quintessential principal-agent relationship, for the client retains ultimate dominion and control over the underlying claim. The attorney can make tactical decisions without consulting the client, but the client still must determine whether to settle or proceed to judgment and make, as well, other critical decisions. The attorney is an agent who is duty bound to act in the principal's interests, and so it is appropriate to treat the full recovery amount as income to the principal. This rule applies regardless of whether the attorney-client contract or state law confers any special rights or protections on the attorney, so long as such protections do not alter the relationship's fundamental principal-agent character. The Court declines to comment on other theories proposed by respondents and their *amici*, which were not advanced in earlier stages of the litigation or examined by the Courts of Appeals. Pp. 434–438.

(d) This Court need not address Banks' contention that application of the anticipatory assignment principle would be inconsistent with the purpose of statutory fee-shifting provisions, such as those applicable in

Syllabus

his case brought under 42 U. S. C. §§ 1981, 1983, and 2000e *et seq.* He settled his case, and the fee paid to his attorney was calculated based solely on the contingent-fee contract. There was no court-ordered fee award or any indication in his contract with his attorney or the settlement that the contingent fee paid was in lieu of statutory fees that might otherwise have been recovered. Also, the American Jobs Creation Act redresses the concern for many, perhaps most, claims governed by fee-shifting statutes. Pp. 438–439.

No. 03–892, 345 F. 3d 373; No. 03–907, 340 F. 3d 1074, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which all other Members joined, except REHNQUIST, C. J., who took no part in the decision of the cases.

David B. Salmons argued the cause *pro hac vice* for petitioner in both cases. With him on the briefs were former *Solicitor General Olson, Acting Solicitor General Clement, Assistant Attorney General O'Connor, Deputy Solicitor General Hungar, Richard Farber,* and *Kenneth W. Rosenberg.*

James R. Carty argued the cause *pro hac vice* for respondent in No. 03–892. With him on the briefs were *Robert G. Wilson, Russell R. Young, Roger J. Jones, William J. Wise,* and *Glenn P. Schwartz. Philip N. Jones* argued the cause for respondent in No. 03–907. With him on the briefs were *Peter J. Duffy, Holly N. Mitchell,* and *Eric Schnapper.*†

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†A brief of *amici curiae* urging reversal in both cases was filed for Gregg D. Polsky et al. by *Mr. Polsky, pro se,* and *Brant J. Hellwig, pro se.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Todd A. Smith;* for the Equal Employment Advisory Council by *Ann Elizabeth Reesman;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Jerome B. Libin, Mary E. Monahan, Barbara R. Arnwine, Michael L. Foreman, Sarah C. Crawford, Audrey J. Wiggins, Ira A. Burnim, Vincent A. Eng, Dennis C. Hayes,* and *Dina R. Lassow;* for the Mountain States Legal Foundation et al. by *William Perry Pendley* and *J. Scott Detamore;* for the National Employment Lawyers Association et al. by *Douglas B. Huron, Victoria W. Ni, Richard A. Marcantonio, Richard A. Rothschild, Theodore M. Shaw, Norman J. Chachkin, Robert H. Stroup,*

JUSTICE KENNEDY delivered the opinion of the Court.

The question in these consolidated cases is whether the portion of a money judgment or settlement paid to a plaintiff's attorney under a contingent-fee agreement is income to the plaintiff under the Internal Revenue Code, 26 U. S. C. § 1 *et seq.* (2000 ed. and Supp. I). The issue divides the courts of appeals. In one of the instant cases, *Banks* v. *Commissioner*, 345 F. 3d 373 (2003), the Court of Appeals for the Sixth Circuit held the contingent-fee portion of a litigation recovery is not included in the plaintiff's gross income. The Courts of Appeals for the Fifth and Eleventh Circuits also adhere to this view, relying on the holding, over Judge Wisdom's dissent, in *Cotnam* v. *Commissioner*, 263 F. 2d 119, 125–126 (CA5 1959). *Srivastava* v. *Commissioner*, 220 F. 3d 353, 363–365 (CA5 2000); *Foster* v. *United States*, 249 F. 3d 1275, 1279–1280 (CA11 2001). In the other case under review, *Banaitis* v. *Commissioner*, 340 F. 3d 1074 (2003), the Court of Appeals for the Ninth Circuit held that the portion of the recovery paid to the attorney as a contingent fee is excluded from the plaintiff's gross income if state law gives the plaintiff's attorney a special property interest in the fee, but not otherwise. Six Courts of Appeals have held the entire litigation recovery, including the portion paid to an attorney as a contingent fee, is income to the plaintiff. Some of these Courts of Appeals discuss state law, but little of their analysis appears to turn on this factor. *Raymond* v. *United States*, 355 F. 3d 107, 113–116 (CA2 2004); *Kenseth* v. *Commissioner*, 259 F. 3d 881, 883–884 (CA7 2001); *Baylin* v. *United States*, 43 F. 3d 1451, 1454–1455 (CA Fed. 1995).

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and *Thomas W. Osborne;* for the Taxpayers Against Fraud Education Fund by *Charles J. Cooper* and *Hamish P. M. Hume;* and for Kenneth W. Gideon et al. by *Mr. Gideon, pro se.*

Briefs of *amici curiae* were filed in both cases for the Oregon Trial Lawyers Association by *Richard S. Yugler;* for Stephen B. Cohen by *Mr. Cohen, pro se;* and for Charles Davenport by *Mr. Davenport, pro se.*

Other Courts of Appeals have been explicit that the fee portion of the recovery is always income to the plaintiff regardless of the nuances of state law. *O'Brien* v. *Commissioner*, 38 T. C. 707, 712 (1962), aff'd, 319 F. 2d 532 (CA3 1963) *(per curiam); Young* v. *Commissioner*, 240 F. 3d 369, 377–379 (CA4 2001); *Hukkanen-Campbell* v. *Commissioner*, 274 F. 3d 1312, 1313–1314 (CA10 2001). We granted certiorari to resolve the conflict. 541 U. S. 958 (2004).

We hold that, as a general rule, when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee. We reverse the decisions of the Courts of Appeals for the Sixth and Ninth Circuits.

I

A. *Commissioner* v. *Banks*

In 1986, respondent John W. Banks, II, was fired from his job as an educational consultant with the California Department of Education. He retained an attorney on a contingent-fee basis and filed a civil suit against the employer in a United States District Court. The complaint alleged employment discrimination in violation of 42 U. S. C. §§ 1981 and 1983, Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, and Cal. Govt. Code Ann. § 12965 (West 1986). The original complaint asserted various additional claims under state law, but Banks later abandoned these. After trial commenced in 1990, the parties settled for $464,000. Banks paid $150,000 of this amount to his attorney pursuant to the fee agreement.

Banks did not include any of the $464,000 in settlement proceeds as gross income in his 1990 federal income tax return. In 1997 the Commissioner of Internal Revenue issued Banks a notice of deficiency for the 1990 tax year. The Tax Court upheld the Commissioner's determination, finding that all the settlement proceeds, including the $150,000 Banks had paid to his attorney, must be included in Banks' gross income.

The Court of Appeals for the Sixth Circuit reversed in part. 345 F. 3d 373 (2003). It agreed the net amount received by Banks was included in gross income but not the amount paid to the attorney. Relying on its prior decision in *Estate of Clarks ex rel. Brisco-Whitter* v. *United States*, 202 F. 3d 854 (2000), the court held the contingent-fee agreement was not an anticipatory assignment of Banks' income because the litigation recovery was not already earned, vested, or even relatively certain to be paid when the contingent-fee contract was made. A contingent-fee arrangement, the court reasoned, is more like a partial assignment of income-producing property than an assignment of income. The attorney is not the mere beneficiary of the client's largess, but rather earns his fee through skill and diligence. 345 F. 3d, at 384–385 (quoting *Estate of Clarks*, *supra*, at 857–858). This reasoning, the court held, applies whether or not state law grants the attorney any special property interest (*e. g.*, a superior lien) in part of the judgment or settlement proceeds.

B. *Commissioner* v. *Banaitis*

After leaving his job as a vice president and loan officer at the Bank of California in 1987, Sigitas J. Banaitis retained an attorney on a contingent-fee basis and brought suit in Oregon state court against the Bank of California and its successor in ownership, the Mitsubishi Bank. The complaint alleged that Mitsubishi Bank willfully interfered with Banaitis' employment contract, and that the Bank of California attempted to induce Banaitis to breach his fiduciary duties to customers and discharged him when he refused. The jury awarded Banaitis compensatory and punitive damages. After resolution of all appeals and post-trial motions, the parties settled. The defendants paid $4,864,547 to Banaitis; and, following the formula set forth in the contingent-fee contract, the defendants paid an additional $3,864,012 directly to Banaitis' attorney.

Banaitis did not include the amount paid to his attorney in gross income on his federal income tax return, and the Commissioner issued a notice of deficiency. The Tax Court upheld the Commissioner's determination, but the Court of Appeals for the Ninth Circuit reversed. 340 F. 3d 1074 (2003). In contrast to the Court of Appeals for the Sixth Circuit, the *Banaitis* court viewed state law as pivotal. Where state law confers on the attorney no special property rights in his fee, the court said, the whole amount of the judgment or settlement ordinarily is included in the plaintiff's gross income. *Id.*, at 1081. Oregon state law, however, like the law of some other States, grants attorneys a superior lien in the contingent-fee portion of any recovery. As a result, the court held, contingent-fee agreements under Oregon law operate not as an anticipatory assignment of the client's income but as a partial transfer to the attorney of some of the client's property in the lawsuit.

II

To clarify why the issue here is of any consequence for tax purposes, two preliminary observations are useful. The first concerns the general issue of deductibility. For the tax years in question the legal expenses in these cases could have been taken as miscellaneous itemized deductions subject to the ordinary requirements, 26 U. S. C. §§ 67–68 (2000 ed. and Supp. I), but doing so would have been of no help to respondents because of the operation of the Alternative Minimum Tax (AMT). For noncorporate individual taxpayers, the AMT establishes a tax liability floor equal to 26 percent of the taxpayer's "alternative minimum taxable income" (minus specified exemptions) up to $175,000, plus 28 percent of alternative minimum taxable income over $175,000. §§ 55(a), (b) (2000 ed.). Alternative minimum taxable income, unlike ordinary gross income, does not allow any miscellaneous itemized deductions. § 56(b)(1)(A)(i).

Second, after these cases arose Congress enacted the American Jobs Creation Act of 2004, 118 Stat. 1418. Section 703 of the Act amended the Code by adding § 62(a)(19). *Id.*, at 1546. The amendment allows a taxpayer, in computing adjusted gross income, to deduct "attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination." *Ibid.* The Act defines "unlawful discrimination" to include a number of specific federal statutes, §§ 62(e)(1) to (16), any federal whistle-blower statute, § 62(e)(17), and any federal, state, or local law "providing for the enforcement of civil rights" or "regulating any aspect of the employment relationship . . . or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law," § 62(e)(18). *Id.*, at 1547–1548. These deductions are permissible even when the AMT applies. Had the Act been in force for the transactions now under review, these cases likely would not have arisen. The Act is not retroactive, however, so while it may cover future taxpayers in respondents' position, it does not pertain here.

III

The Internal Revenue Code defines "gross income" for federal tax purposes as "all income from whatever source derived." 26 U. S. C. § 61(a). The definition extends broadly to all economic gains not otherwise exempted. *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 429–430 (1955); *Commissioner* v. *Jacobson*, 336 U. S. 28, 49 (1949). A taxpayer cannot exclude an economic gain from gross income by assigning the gain in advance to another party. *Lucas* v. *Earl*, 281 U. S. 111 (1930); *Commissioner* v. *Sunnen*, 333 U. S. 591, 604 (1948); *Helvering* v. *Horst*, 311 U. S. 112, 116–117 (1940). The rationale for the so-called anticipatory assignment of income doctrine is the principle that gains should be taxed "to those who earned them," *Lucas*, *supra*,

at 114, a maxim we have called "the first principle of income taxation," *Commissioner* v. *Culbertson*, 337 U. S. 733, 739–740 (1949). The anticipatory assignment doctrine is meant to prevent taxpayers from avoiding taxation through "arrangements and contracts however skillfully devised to prevent [income] when paid from vesting even for a second in the man who earned it." *Lucas*, 281 U. S., at 115. The rule is preventative and motivated by administrative as well as substantive concerns, so we do not inquire whether any particular assignment has a discernible tax avoidance purpose. As *Lucas* explained, "no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew." *Ibid.*

Respondents argue that the anticipatory assignment doctrine is a judge-made antifraud rule with no relevance to contingent-fee contracts of the sort at issue here. The Commissioner maintains that a contingent-fee agreement should be viewed as an anticipatory assignment to the attorney of a portion of the client's income from any litigation recovery. We agree with the Commissioner.

In an ordinary case attribution of income is resolved by asking whether a taxpayer exercises complete dominion over the income in question. *Glenshaw Glass Co.*, *supra*, at 431; see also *Commissioner* v. *Indianapolis Power & Light Co.*, 493 U. S. 203, 209 (1990); *Commissioner* v. *First Security Bank of Utah, N. A.*, 405 U. S. 394, 403 (1972). In the context of anticipatory assignments, however, the assignor often does not have dominion over the income at the moment of receipt. In that instance the question becomes whether the assignor retains dominion over the income-generating asset, because the taxpayer "who owns or controls the source of the income, also controls the disposition of that which he could have received himself and diverts the payment from himself to others as the means of procuring the satisfaction of his wants." *Horst*, *supra*, at 116–117. See also *Lucas*,

supra, at 114–115; *Helvering* v. *Eubank*, 311 U. S. 122, 124–125 (1940); *Sunnen*, *supra*, at 604. Looking to control over the income-generating asset, then, preserves the principle that income should be taxed to the party who earns the income and enjoys the consequent benefits.

In the case of a litigation recovery the income-generating asset is the cause of action that derives from the plaintiff's legal injury. The plaintiff retains dominion over this asset throughout the litigation. We do not understand respondents to argue otherwise. Rather, respondents advance two counterarguments. First, they say that, in contrast to the bond coupons assigned in *Horst*, the value of a legal claim is speculative at the moment of assignment, and may be worth nothing at all. Second, respondents insist that the claimant's legal injury is not the only source of the ultimate recovery. The attorney, according to respondents, also contributes income-generating assets—effort and expertise—without which the claimant likely could not prevail. On these premises respondents urge us to treat a contingent-fee agreement as establishing, for tax purposes, something like a joint venture or partnership in which the client and attorney combine their respective assets—the client's claim and the attorney's skill—and apportion any resulting profits.

We reject respondents' arguments. Though the value of the plaintiff's claim may be speculative at the moment the fee agreement is signed, the anticipatory assignment doctrine is not limited to instances when the precise dollar value of the assigned income is known in advance. *Lucas*, *supra*; *United States* v. *Basye*, 410 U. S. 441, 445, 450–452 (1973). Though *Horst* involved an anticipatory assignment of a predetermined sum to be paid on a specific date, the holding in that case did not depend on ascertaining a liquidated amount at the time of assignment. In each of the cases before us, as in *Horst*, the taxpayer retained control over the income-generating asset, diverted some of the income produced to another party, and realized a benefit by doing so. As Judge

Wesley correctly concluded in a recent case, the rationale of *Horst* applies fully to a contingent-fee contract. *Raymond* v. *United States*, 355 F. 3d, at 115–116. That the amount of income the asset would produce was uncertain at the moment of assignment is of no consequence.

We further reject the suggestion to treat the attorney-client relationship as a sort of business partnership or joint venture for tax purposes. The relationship between client and attorney, regardless of the variations in particular compensation agreements or the amount of skill and effort the attorney contributes, is a quintessential principal-agent relationship. Restatement (Second) of Agency § 1, Comment *e* (1957) (hereinafter Restatement); ABA Model Rules of Professional Conduct Rule 1.3, and Comment 1; Rule 1.7, and Comment 1 (2002). The client may rely on the attorney's expertise and special skills to achieve a result the client could not achieve alone. That, however, is true of most principal-agent relationships, and it does not alter the fact that the client retains ultimate dominion and control over the underlying claim. The control is evident when it is noted that, although the attorney can make tactical decisions without consulting the client, the plaintiff still must determine whether to settle or proceed to judgment and make, as well, other critical decisions. Even where the attorney exercises independent judgment without supervision by, or consultation with, the client, the attorney, as an agent, is obligated to act solely on behalf of, and for the exclusive benefit of, the client-principal, rather than for the benefit of the attorney or any other party. Restatement §§ 13, 39, 387.

The attorney is an agent who is dutybound to act only in the interests of the principal, and so it is appropriate to treat the full amount of the recovery as income to the principal. In this respect Judge Posner's observation is apt: "[T]he contingent-fee lawyer [is not] a joint owner of his client's claim in the legal sense any more than the commission salesman is a joint owner of his employer's accounts receivable."

Kenseth, 259 F. 3d, at 883. In both cases a principal relies on an agent to realize an economic gain, and the gain realized by the agent's efforts is income to the principal. The portion paid to the agent may be deductible, but absent some other provision of law it is not excludable from the principal's gross income.

This rule applies whether or not the attorney-client contract or state law confers any special rights or protections on the attorney, so long as these protections do not alter the fundamental principal-agent character of the relationship. Cf. Restatement § 13, Comment *b*, and § 14G, Comment *a* (an agency relationship is created where a principal assigns a chose in action to an assignee for collection and grants the assignee a security interest in the claim against the assignor's debtor in order to compensate the assignee for his collection efforts). State laws vary with respect to the strength of an attorney's security interest in a contingent fee and the remedies available to an attorney should the client discharge or attempt to defraud the attorney. No state laws of which we are aware, however, even those that purport to give attorneys an "ownership" interest in their fees, *e. g.*, 340 F. 3d, at 1082–1083 (discussing Oregon law); *Cotnam*, 263 F. 2d, at 125 (discussing Alabama law), convert the attorney from an agent to a partner.

Respondents and their *amici* propose other theories to exclude fees from income or permit deductibility. These suggestions include: (1) The contingent-fee agreement establishes a Subchapter K partnership under 26 U. S. C. §§ 702, 704, and 761, Brief for Respondent in No. 03–907, pp. 5–21; (2) litigation recoveries are proceeds from disposition of property, so the attorney's fee should be subtracted as a capital expense pursuant to §§ 1001, 1012, and 1016, Brief for Association of Trial Lawyers of America as *Amicus Curiae* 23–28, Brief for Charles Davenport as *Amicus Curiae* 3–13; and (3) the fees are deductible reimbursed employee business expenses under § 62(a)(2)(A) (2000 ed. and Supp. I), Brief for

Stephen B. Cohen as *Amicus Curiae*. These arguments, it appears, are being presented for the first time to this Court. We are especially reluctant to entertain novel propositions of law with broad implications for the tax system that were not advanced in earlier stages of the litigation and not examined by the Courts of Appeals. We decline comment on these supplementary theories. In addition, we do not reach the instance where a relator pursues a claim on behalf of the United States. Brief for Taxpayers Against Fraud Education Fund as *Amicus Curiae* 10–20.

IV

The foregoing suffices to dispose of Banaitis' case. Banks' case, however, involves a further consideration. Banks brought his claims under federal statutes that authorize fee awards to prevailing plaintiffs' attorneys. He contends that application of the anticipatory assignment principle would be inconsistent with the purpose of statutory fee-shifting provisions. See *Venegas* v. *Mitchell*, 495 U. S. 82, 86 (1990) (observing that statutory fees enable "plaintiffs to employ reasonably competent lawyers without cost to themselves if they prevail"). In the federal system statutory fees are typically awarded by the court under the lodestar approach, *Hensley* v. *Eckerhart*, 461 U. S. 424, 433 (1983), and the plaintiff usually has little control over the amount awarded. Sometimes, as when the plaintiff seeks only injunctive relief, or when the statute caps plaintiffs' recoveries, or when for other reasons damages are substantially less than attorney's fees, court-awarded attorney's fees can exceed a plaintiff's monetary recovery. See, *e. g.*, *Riverside* v. *Rivera*, 477 U. S. 561, 564–565 (1986) (compensatory and punitive damages of $33,350; attorney's fee award of $245,456.25). Treating the fee award as income to the plaintiff in such cases, it is argued, can lead to the perverse result that the plaintiff loses money by winning the suit. Furthermore, it is urged that treating statutory fee awards as income to plaintiffs would

undermine the effectiveness of fee-shifting statutes in deputizing plaintiffs and their lawyers to act as private attorneys general.

We need not address these claims. After Banks settled his case, the fee paid to his attorney was calculated solely on the basis of the private contingent-fee contract. There was no court-ordered fee award, nor was there any indication in Banks' contract with his attorney, or in the settlement agreement with the defendant, that the contingent fee paid to Banks' attorney was in lieu of statutory fees Banks might otherwise have been entitled to recover. Also, the amendment added by the American Jobs Creation Act redresses the concern for many, perhaps most, claims governed by fee-shifting statutes.

* * *

For the reasons stated, the judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of these cases.

Syllabus

HOWELL, AKA COX *v.* MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 03–9560. Argued November 29, 2004—Decided January 24, 2005

Petitioner appealed his capital murder conviction and death sentence, claiming, *inter alia*, that the trial court erred by failing to give a lesser-included-offense instruction on simple murder or manslaughter. The State Supreme Court affirmed. In granting certiorari, this Court asked the parties to address the question whether petitioner properly raised in the State Supreme Court the federal claim that his death sentence is unconstitutional under *Beck* v. *Alabama*, 447 U. S. 625, 638.

Held: Because petitioner did not properly raise his federal claim in the State Supreme Court, the writ of certiorari is dismissed as improvidently granted. Petitioner's argument that he presented his federal claim by citing a state case, which cited another state case, which in turn cited *Beck*, presents a daisy chain too lengthy to meet this Court's standards for proper presentation of a federal claim. Nor was his federal claim raised by implication under a state-law rule similar to the constitutional rule articulated in *Beck*, because the state and federal standards are not identical. Finally, even if this Court's requirement that a federal claim be raised in state court is prudential rather than jurisdictional, "the circumstances here justify no exception." *Adams* v. *Robertson*, 520 U. S. 83, 90 *(per curiam)*.

Certiorari dismissed. Reported below: 860 So. 2d 704.

Ronnie Monroe Mitchell argued the cause for petitioner. With him on the briefs were *André de Gruy*, *Duncan Lott*, and *William Odum Richardson*, by appointment of the Court, 543 U. S. 977.

Jim Hood, Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *Judy Thomas Martin*, Special Assistant Attorney General.*

**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae*.

PER CURIAM.

Petitioner Marlon Howell contends that the Mississippi courts violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution by refusing to require a jury instruction about a lesser included offense in his capital case. He did not, however, raise this claim in the Supreme Court of Mississippi, which unsurprisingly did not address it. As a result, we dismiss the writ of certiorari as improvidently granted.

Petitioner was convicted and sentenced to death for killing Hugh David Pernell. Shortly after 5 a.m. on May 15, 2000, Pernell was delivering newspapers from his car when the occupants of another car motioned for him to stop. The evidence at trial indicated that, when both cars had pulled over, petitioner got out of the trailing car and approached the driver's side of Pernell's car. After a brief conversation and perhaps some kind of scuffle, petitioner pulled out a pistol, shot Pernell through the heart, got back in the other car, and fled the scene. See 860 So. 2d 704, 712–715, 738–739 (Miss. 2003). At trial, petitioner argued both that he was in another city at the time of the killing and that the evidence was insufficient to prove that Pernell was killed during an attempted robbery (which would deprive the State of an element of capital murder). As part of his nonalibi defense, petitioner sought to supplement the State's proposed jury instruction on capital murder with instructions on manslaughter and simple murder. The trial court refused the additional instructions. The jury found petitioner guilty of capital murder and separately concluded that he should be sentenced to death.

On appeal to the State Supreme Court, one of petitioner's 28 claims of error was the trial court's failure "to give the defendant an instruction on the offense of simple murder or manslaughter." App. 39. In that argument, petitioner cited three cases from the State Supreme Court about

lesser-included-offense instructions, and the only opinion whose original language he quoted was a noncapital case. *Ibid.* (quoting, with modifications, *Conner* v. *State*, 632 So. 2d 1239, 1254 (Miss. 1993) (a capital case), in turn quoting *McGowan* v. *State*, 541 So. 2d 1027, 1028 (Miss. 1989) (a noncapital case), in turn quoting *Harper* v. *State*, 478 So. 2d 1017, 1021 (Miss. 1985) (a noncapital case)). Petitioner argued that, because the jury "could have found and returned the lesser included offense of simple murder or manslaughter," the failure to give instructions on those offenses was "error" that left the jury no "choice but either to turn [him] loose or convict him of [c]apital [m]urder." App. 40. In the course of affirming petitioner's conviction and death sentence, the State Supreme Court found that "[t]he facts of this case clearly do not support or warrant" the instruction for manslaughter or simple murder. 860 So. 2d, at 744. The court cited and quoted a prior noncapital decision, which construed a state statute and concluded that an instruction should be refused if it would cause the jury to "'ignore the primary charge'" or "'if the evidence does not justify submission of a lesser-included offense.'" *Ibid.* (quoting *Presley* v. *State*, 321 So. 2d 309, 310–311 (Miss. 1975)). The court also cited *Grace* v. *State*, 375 So. 2d 419 (Miss. 1979), an aggravated-assault case rejecting an instruction for simple assault.

Petitioner sought certiorari from this Court, arguing that his death sentence is unconstitutional under that rule of our capital jurisprudence set forth in *Beck* v. *Alabama*, 447 U. S. 625, 638 (1980) ("[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that option from the jury in a capital case"). See Pet. for Cert. 5. We granted certiorari, but asked the parties to address the following additional question: "'Was petitioner's federal constitutional claim properly raised before the Mississippi Supreme Court for purposes of 28 U. S. C. § 1257?'" 542 U. S. 936 (2004). Our answer to that

question prevents us from reaching petitioner's constitutional claim.

Congress has given this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States." 28 U. S. C. § 1257(a) (emphasis added). Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams* v. *Robertson*, 520 U. S. 83, 86 (1997) *(per curiam);* see also *Illinois* v. *Gates*, 462 U. S. 213, 218 (1983) (tracing this principle back to *Crowell* v. *Randell*, 10 Pet. 368, 392 (1836), and *Owings* v. *Norwood's Lessee*, 5 Cranch 344 (1809)).

Petitioner's brief in the State Supreme Court did not properly present his claim as one arising under federal law.[1] In the relevant argument, he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases. Instead, he argues that he presented his federal claim by citing *Harveston* v. *State*, 493 So. 2d 365 (Miss. 1986), which cited (among other cases) *Fairchild* v. *State*, 459 So. 2d 793 (Miss. 1984), which in turn cited *Beck*, but only by way of acknowledging that Mississippi's general rule requiring lesser-included-offense instructions "takes on constitutional proportions" in capital cases. 459 So. 2d, at 800. Assuming it constituted adequate briefing of the federal question under state-law standards, petitioner's daisy chain—which depends upon a case that was cited by one of the cases that was cited by one of the cases that petitioner cited—is too lengthy to meet this Court's standards for

[1] Petitioner argues not that the State Supreme Court actually addressed his federal claim, but rather that it "had an adequate opportunity to address" it. Brief for Petitioner 19.

proper presentation of a federal claim.[2] As we recently explained in a slightly different context, "[a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin* v. *Reese*, 541 U. S. 27, 32 (2004). In the context of § 1257, the same steps toward clarity are just as easy to take and are generally necessary to establish that a federal question was properly presented to a state court. Petitioner did none of these things.

Petitioner also contends that he raised his federal claim by implication because the state-law rule on which he relied was "identical," Tr. of Oral Arg. 17, or "virtually identical," Brief for Petitioner 17–18, to the constitutional rule articulated in *Beck*. Assuming, without deciding, that identical standards might overcome a petitioner's failure to identify his claim as federal, Mississippi's rule regarding lesser-included-offense instructions is not identical to *Beck*—or at least not identical to the Mississippi Supreme Court's interpretation of *Beck*. Mississippi's rule applies even when the jury is not choosing only between acquittal and death. The Mississippi Supreme

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[2] See, *e. g.*, *Adams* v. *Robertson*, 520 U. S. 83, 89, n. 3 (1997) *(per curiam)* (concluding that "passing invocations of 'due process'" that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a *federal* claim was presented"); *Webb* v. *Webb*, 451 U. S. 493, 496 (1981) (finding a reference to "full faith and credit" insufficient to raise a federal claim without a reference to the U. S. Constitution or to any cases relying on it); *New York Central R. Co.* v. *New York*, 186 U. S. 269, 273 (1902) ("[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth"); *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655 (1897) (a party's intent to invoke the Federal Constitution must be "unmistakably" declared, and the statutory requirement is not met if "the purpose of the party to assert a Federal right is left to mere inference").

Court's interpretation of *Beck*, on the other hand, holds that case inapplicable where the jury has the additional option of life imprisonment, see *Jackson* v. *State*, 684 So. 2d 1213, 1228 (1996)—a conclusion that finds some support in our cases, see *Hopkins* v. *Reeves*, 524 U. S. 88, 98 (1998) ("In *Beck*, the death penalty was automatically tied to conviction, and Beck's jury was told that if it convicted the defendant of the charged offense, it was required to impose the death penalty"); *Schad* v. *Arizona*, 501 U. S. 624, 646 (1991) ("Our fundamental concern in *Beck* was that a jury . . . might . . . vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all"). Moreover, unlike *Beck*, see 447 U. S., at 638, n. 14, Mississippi's rule on lesser-included-offense instructions applies in *noncapital* cases (as shown by the cases petitioner did cite). Thus, one opinion of the Mississippi Supreme Court appears to have treated a claim under *Beck* as distinct from one arising under the Mississippi rule. See *Goodin* v. *State*, 787 So. 2d 639, 656 (2001) ("Having found no [federal] constitutional flaws in the jury instruction given, we must now determine whether our practice entitles Goodin to a manslaughter instruction. We have held that there must be some evidentiary support to grant an instruction for manslaughter").

Petitioner suggests that we need not treat his failure to present his federal claim in state court as jurisdictional. Reply Brief for Petitioner 4, and n. 1. Notwithstanding the long line of cases clearly stating that the presentation requirement is jurisdictional, see, *e. g.*, *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 181, n. 3 (1983); *Cardinale* v. *Louisiana*, 394 U. S. 437, 438–439 (1969) (citing cases), a handful of exceptions (discussed in *Gates*, *supra*, at 219) have previously led us to conclude that this is "an unsettled question." *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 79 (1988). As in prior cases, however, we need not decide today "whether our requirement that a federal claim be addressed or properly presented in state court is jurisdic-

tional or prudential, because even treating the rule as purely prudential, the circumstances here justify no exception." *Adams*, 520 U. S., at 90 (citations omitted); accord, *Yee* v. *Escondido*, 503 U. S. 519, 533 (1992); *Bankers Life*, *supra*, at 79; *Heath* v. *Alabama*, 474 U. S. 82, 87 (1985); *Gates*, 462 U. S., at 222.[3]

Accordingly, we dismiss the writ of certiorari as improvidently granted.

It is so ordered.

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[3] In *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 476 U. S. 877, 883 (1986), the Court chose to reach a question that had not been presented in state court for two reasons that are inapplicable here: because the other party had no objection to reaching the question, and because the case had previously been remanded to the state court on other grounds.

Per Curiam

BELL *v.* CONE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–394. Decided January 24, 2005

The Tennessee jury found that four aggravating circumstances, including that the murders committed by respondent were "especially heinous, atrocious, or cruel," outweighed the mitigating evidence, and sentenced respondent to death. His direct appeal and state collateral attacks proved unsuccessful, and the Federal District Court denied habeas relief. Ultimately, the Sixth Circuit reversed on the ground that the "especially heinous, atrocious, or cruel" aggravator was unconstitutionally vague under the Eighth Amendment, and that the State Supreme Court had not applied a narrowing construction adopted in its earlier *Dicks* case to cure the aggravation.

Held: The Sixth Circuit had no power to issue a writ of habeas corpus. Assuming that it correctly concluded that the State's statutory aggravating circumstance was facially vague, it erred in presuming that the State Supreme Court did not cure that vagueness because the state court neither mentioned nor cited *Dicks*. Under 28 U. S. C. § 2254(d)'s "'highly deferential standard for evaluating state-court rulings,'" *Woodford* v. *Visciotti*, 537 U. S. 19, 24 *(per curiam)*, federal courts are not free to presume that a state court did not comply with constitutional dictates based on nothing more than a lack of citation. In addition, absent an affirmative indication to the contrary, this Court must presume that the Tennessee Supreme Court followed its established precedent, as it had done numerous other times. Even absent that presumption, this Court would still conclude that the state court applied the narrower construction, since its reasoning here closely resembled its rationale in cases where it had expressly done so. And that construction, the exact one approved by this Court in *Proffitt* v. *Florida*, 428 U. S. 242, 255, is not itself unconstitutionally vague.

Certiorari granted; 359 F. 3d 785, reversed and remanded.

PER CURIAM.

The United States Court of Appeals for the Sixth Circuit granted a writ of habeas corpus to respondent Gary Bradford Cone after concluding that the "especially heinous, atrocious, or cruel" aggravating circumstance found by the jury at the

sentencing phase of his trial was unconstitutionally vague, and that the Tennessee Supreme Court failed to cure any constitutional deficiencies on appeal. 359 F. 3d 785, 799 (2004). Because this result fails to accord to the state court the deference required by 28 U. S. C. § 2254(d), we grant the petition for certiorari and respondent's motion to proceed *in forma pauperis* and reverse.

I

Respondent killed Shipley Todd, 93, and his wife Cleopatra, 79, on August 10, 1980, in their home at the conclusion of a 2-day crime spree. The killings were accomplished in a brutal and callous fashion: The elderly victims were "repeatedly beaten about the head until they died," *State* v. *Cone*, 665 S. W. 2d 87, 90–91 (Tenn. 1984), and their bodies were subsequently discovered "horribly mutilated and cruelly beaten," *id.*, at 90. A Tennessee jury convicted respondent of, *inter alia*, two counts of murder in the first degree and two counts of murder in the first degree in the perpetration of a burglary. At the conclusion of the penalty phase of respondent's trial, the jury unanimously found four aggravating circumstances[1] and concluded that they outweighed the mitigating evidence. Respondent was sentenced to death.

The Tennessee Supreme Court affirmed respondent's convictions and sentence. *Id.*, at 96. As relevant here, the court held that three of the aggravating circumstances found by the jury "were clearly shown by the evidence." *Id.*, at

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[1] The jury found the following aggravating circumstances: (1) respondent had been convicted of one or more felonies involving the use or threat of violence to a person, (2) the murders were "especially heinous, atrocious, or cruel in that they involved torture or depravity of mind," (3) respondent committed the murders for the purpose of preventing a lawful arrest or prosecution, and (4) respondent knowingly created a risk of death to two or more persons, other than the victim murdered, during the murder. See *State* v. *Cone*, 665 S. W. 2d 87, 94–95 (Tenn. 1984).

94.[2] With respect to the jury's finding that the murders were "especially heinous, atrocious, or cruel," the court said:

> "The jury also found that the murders in question were especially heinous, atrocious, or cruel in that they involved torture or depravity of mind as provided in [Tenn. Code Ann.] § 39–2–203(i)(5). The evidence abundantly established that both of the elderly victims had been brutally beaten to death by multiple crushing blows to the skulls. Blood was spattered throughout the house, and both victims apparently had attempted to resist, because numerous defensive wounds were found on their persons. The only excuse offered in the entire record for this unspeakably brutal conduct by the accused was that these elderly victims had at some point ceased to 'cooperate' with him in his ransacking of their home and in his effort to flee from arrest. As previously stated, it was stipulated by counsel for [respondent] that there was no issue of self-defense even remotely suggested. The deaths of the victims were not instantaneous, and obviously one had to be killed before the other. The terror, fright and horror that these elderly helpless citizens must have endured was certainly something that the jury could have taken into account in finding this aggravating circumstance." *Id.*, at 94–95.

Respondent twice sought relief from his conviction and sentence in collateral proceedings in state court, to no avail. In his second amended petition for postconviction relief, respondent raised 52 independent claims of constitutional

[2] The state court rejected the jury's finding that respondent "'knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder,'" on the ground that the considerable threat respondent posed to others earlier in the day was not sufficiently close in time to the murders. Based on the strength of the other aggravating circumstances before the jury, the court held this error to be "harmless beyond a reasonable doubt." *Id.*, at 95.

error, including a contention that the "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague under the Eighth Amendment. The state trial court held each of respondent's claims barred by Tenn. Code Ann. §40–30–111 (1990), which limited the grounds that may be raised on collateral review to those not waived or previously determined in previous proceedings. The trial court explained that respondent's constitutional challenge to the "heinous, atrocious, or cruel" aggravating circumstance, along with many other claims, was "clearly [a] re-statemen[t] of previous grounds heretofore determined and denied by the Tennessee Supreme Court upon Direct Appeal or the Court of Criminal Appeals upon the First Petition." *Cone* v. *State*, No. P–06874 (Tenn. Crim. Ct., Dec. 16, 1993), p. 6. The Tennessee Court of Criminal Appeals affirmed the denial of relief on all grounds. *Cone* v. *State*, 927 S. W. 2d 579, 582 (1995). The State Supreme Court denied respondent permission to appeal.

II

In 1997, respondent sought a writ of habeas corpus under 28 U. S. C. §2254 in the United States District Court for the Western District of Tennessee, again asserting a multitude of claims. The District Court denied relief; it held respondent's vagueness challenge to the "especially heinous, atrocious, or cruel" aggravating circumstance to be procedurally barred by respondent's failure to raise it on direct appeal in state court. The Court of Appeals for the Sixth Circuit subsequently held that respondent was entitled to relief on another ground and did not consider respondent's challenges to the aggravating circumstances found by the jury. *Cone* v. *Bell*, 243 F. 3d 961, 975 (2001). We reversed that judgment. *Bell* v. *Cone*, 535 U. S. 685, 702 (2002).

On remand, the same panel of the Sixth Circuit again granted respondent a writ of habeas corpus, this time with one judge dissenting, on the ground that the "especially hei-

nous, atrocious, or cruel" aggravator was unconstitutionally vague under the Eighth Amendment. The court first rejected petitioner's argument that respondent procedurally defaulted the claim in state court. Based on its understanding of state law, the court concluded that the State Supreme Court's statutorily mandated review of each death sentence, see Tenn. Code Ann. §39–2–205(c)(1) (1982), necessarily included the consideration of constitutional deficiencies in the aggravating circumstances found by the jury and therefore that the issue was "fairly presented" to the state court, even if respondent did not raise it himself.[3] 359 F. 3d, at 791–793. Judge Norris dissented on this point. *Id.*, at 806.

Turning to the merits, the Sixth Circuit held that the state court's affirmance of respondent's sentence in light of the "especially heinous, atrocious, or cruel" aggravating circumstance was "contrary to" the clearly established principles set forth in our decision in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). The Court of Appeals allowed that "[n]o Supreme Court case has addressed the precise language at issue," 359 F. 3d, at 795, and that no "Supreme Court decisio[n] is 'on all

[3] Petitioner argues that the Sixth Circuit's conclusion in this regard is in tension with the decisions of other Courts of Appeals, which have held that a petitioner must raise his constitutional claim in state court in order to preserve it, notwithstanding the existence of a mandatory-review statute. See *Mu'min* v. *Pruett*, 125 F. 3d 192, 197 (CA4 1997) (Virginia); *Martinez-Villareal* v. *Lewis*, 80 F. 3d 1301, 1306 (CA9 1996) (Arizona); *Kornahrens* v. *Evatt*, 66 F. 3d 1350, 1362 (CA4 1995) (South Carolina); *Nave* v. *Delo*, 62 F. 3d 1024, 1039 (CA8 1995) (Missouri); *Julius* v. *Johnson*, 840 F. 2d 1533, 1546 (CA11 1988) (Alabama). We find it unnecessary to express a view on this point. See 28 U. S. C. §2254(b)(2) (an application for habeas corpus may be denied on the merits, notwithstanding a petitioner's failure to exhaust in state court). We do emphasize that, as a general matter, the burden is on the petitioner to raise his federal claim in the state courts at a time when state procedural law permits its consideration on the merits, even if the state court could have identified and addressed the federal question without its having been raised. See *Baldwin* v. *Reese*, 541 U. S. 27, 30–32 (2004).

fours' with the instruction in Cone's case,"[4] *id.*, at 796, but nevertheless concluded, in light of *Godfrey* and the series of cases that followed it, *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), *Walton* v. *Arizona*, 497 U. S. 639 (1990), and *Shell* v. *Mississippi*, 498 U. S. 1 (1990) *(per curiam)*, that federal law dictated the conclusion that the State's "especially heinous, atrocious, or cruel" aggravator was unconstitutionally vague.[5] 359 F. 3d, at 797. Lastly, the court rejected petitioner's argument that the Tennessee Supreme Court cured any deficiency in the aggravating circumstance on direct appeal by reviewing the jury's finding under the narrowed construction of the aggravator that it adopted in *State* v. *Dicks*, 615 S. W. 2d 126 (1981). 359 F. 3d, at 797.

III

A federal court may grant a writ of habeas corpus based on a claim adjudicated by a state court if the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1). A state court's decision is "contrary to . . . clearly established Federal law" "if the state court applies a

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[4] The jury was instructed with respect to this aggravated circumstance as follows:

"'Heinous' means extremely wicked or shockingly evil.

"'Atrocious' means outrageously wicked and vile.

"'Cruel' means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless." 359 F. 3d, at 794.

[5] The court recognized that these cases postdated the Tennessee Supreme Court's 1984 decision on direct appeal, but, relying on *Stringer* v. *Black*, 503 U. S. 222, 225 (1992) (which held that *Cartwright* did not announce a "new rule" of constitutional law because its resolution was dictated by *Godfrey*), concluded that these later cases were "not only material, but controlling" and required the conclusion that Tennessee's "heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague on its face. 359 F. 3d, at 795. We assume, without deciding, that the Court of Appeals was correct in this conclusion.

rule that contradicts the governing law set forth in our cases," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams* v. *Taylor*, 529 U. S. 362, 405 (2000).

The law governing vagueness challenges to statutory aggravating circumstances was summarized aptly in *Walton*, *supra*, overruled on other grounds, *Ring* v. *Arizona*, 536 U. S. 584 (2002):

> "When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, *i. e.*, whether they provide *some* guidance to the sentencer." *Walton*, *supra*, at 654.

These principles were plain enough at the time the State Supreme Court decided respondent's appeal. In *Proffitt* v. *Florida*, 428 U. S. 242 (1976), we upheld the aggravating circumstance that the murder was "'especially heinous, atrocious, or cruel'" on the express ground that a narrowing construction had been adopted by that State's Supreme Court. *Id.*, at 255 (joint opinion of Stewart, Powell, and STEVENS, JJ.). And, in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), we refused to invalidate the aggravating circumstance that the murder was "'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim,'" because "there [was] no reason to assume that the Supreme Court of Georgia will adopt . . . an open-ended construction" that is potentially applicable to any murder. *Id.*, at 201 (joint opinion of

Stewart, Powell, and STEVENS, JJ.). See generally *Lewis* v. *Jeffers*, 497 U. S. 764, 774–777 (1990) (reviewing cases).

Indeed, in *Godfrey*, 446 U. S. 420, the case on which the Court of Appeals relied in declaring the aggravating circumstance to be unconstitutionally vague, the controlling plurality opinion followed precisely this procedure. Like the court below, the plurality looked first to the language of the aggravating circumstance found by the jury and concluded that there was "nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id.*, at 428. But the plurality did not stop there: It next evaluated whether the Georgia Supreme Court "applied a constitutional construction" of the aggravating circumstance on appeal. *Id.*, at 432. Because the facts of the case did not resemble those in which the state court had previously applied a narrower construction of the aggravating circumstance and because the state court gave no explanation for its decision other than to say that the verdict was "'factually substantiated,'" the plurality concluded that it did not. *Id.*, at 432–433. As we have subsequently explained, this conclusion was the linchpin of the Court's holding: "Had the Georgia Supreme Court applied a narrowing construction of the aggravator, we would have rejected the Eighth Amendment challenge to Godfrey's death sentence, notwithstanding the failure to instruct the jury on that narrowing construction." *Lambrix* v. *Singletary*, 520 U. S. 518, 531 (1997). See also *Walton*, *supra*, at 653–654; *Cartwright*, *supra*, at 363–365 (refusing to countenance the Oklahoma Court of Criminal Appeals' affirmance of a death sentence based on a facially vague aggravating circumstance where that court had not adopted a narrowing construction of its aggravator when it affirmed the prisoner's sentence).[6]

[6] In *Ring* v. *Arizona*, 536 U. S. 584 (2002), we held that the Sixth Amendment requires a jury, rather than a judge, to find the aggravating circumstance that renders a defendant death eligible. *Id.*, at 609. Because

In this case, however, the Sixth Circuit rejected the possibility that the Tennessee Supreme Court cured any error in the jury instruction by applying a narrowing construction of the statutory "heinous, atrocious, or cruel" aggravator. The court asserted that the State Supreme Court "did not apply, or even mention, any narrowing interpretation or cite to *[sic] Dicks*," the case in which the State Supreme Court had adopted a narrowing construction of the aggravating circumstance. 359 F. 3d, at 797. "Instead," the court said, "the [state] court simply, but explicitly, satisfied itself that the labels 'heinous, atrocious, or cruel,' without more, applied to [respondent's] crime." *Ibid.*

We do not think that a federal court can presume so lightly that a state court failed to apply its own law. As we have said before, § 2254(d) dictates a " 'highly deferential standard for evaluating state-court rulings,' *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997), which demands that state-court decisions be given the benefit of the doubt." *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) *(per curiam)*. To the extent that the Court of Appeals rested its decision on the state court's failure to cite *Dicks*, it was mistaken. Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation. See *Mitchell* v. *Esparza*, 540 U. S. 12, 16 (2003) *(per curiam)*; *Early* v. *Packer*, 537 U. S. 3, 8 (2002) *(per curiam)*.

More importantly, however, we find no basis for the Court of Appeals' statement that the state court "simply, but explicitly, satisfied itself that the labels 'heinous, atrocious, or cruel,' without more, applied" to the murder. 359 F. 3d, at 797. The state court's opinion does not disclaim application of that court's established construction of the aggravating

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Ring does not apply retroactively, *Schriro* v. *Summerlin*, 542 U. S. 348, 358 (2004), this case does not present the question whether an appellate court may, consistently with *Ring*, cure the finding of a vague aggravating circumstance by applying a narrower construction.

circumstance; the only thing that it states "explicitly" is that the evidence in this case supported the jury's finding of the statutory aggravator. See *Cone*, 665 S. W. 2d, at 95 (stating that the aggravating circumstance was "indisputably established by the record"). As we explain below, the State Supreme Court had construed the aggravating circumstance narrowly and had followed that precedent numerous times; absent an affirmative indication to the contrary, we must presume that it did the same thing here. See *Visciotti*, *supra*, at 24 (stating the presumption that state courts "know and follow the law"); *Lambrix*, *supra*, at 532, n. 4; *Walton*, 497 U. S., at 653. That is especially true in a case such as this one, where the state court has recognized that its narrowing construction is constitutionally compelled and has affirmatively assumed the responsibility to ensure that the aggravating circumstance is applied constitutionally in each case. See *State* v. *Pritchett*, 621 S. W. 2d 127, 139, 140 (Tenn. 1981).

Even absent such a presumption in the state court's favor, however, we would still conclude in this case that the state court applied the narrower construction of the "heinous, atrocious, or cruel" aggravating circumstance. The State Supreme Court's reasoning in this case closely tracked its rationale for affirming the death sentences in other cases in which it expressly applied a narrowed construction of the same "heinous, atrocious, or cruel" aggravator. Accord, *Godfrey*, *supra*, at 432 (holding that "[t]he circumstances of this case . . . do not satisfy the criteria [for torture] laid out by the Georgia Supreme Court itself" in its cases construing the aggravating circumstance). The facts the court relied on to affirm the jury's verdict—that the elderly victims attempted to resist, that their deaths were not instantaneous, that respondent's actions toward them were "unspeakably brutal," and that they endured "terror, fright and horror" before being killed, 665 S. W. 2d, at 95—match, almost exactly, the reasons the state court gave when it held the evidence in *State* v. *Melson*, 638 S. W. 2d 342, 367 (Tenn.

1982), to be sufficient to satisfy the torture prong of the narrowed "heinous, atrocious, or cruel" aggravating circumstance. See also *Pritchett*, *supra*, at 139 (finding the evidence to be insufficient to satisfy a narrowed construction of the aggravator where the victim's death was "instantaneous"); *State* v. *Campbell*, 664 S. W. 2d 281, 284 (Tenn. 1984) (holding that evidence of the aggravator was "overwhelming" where an elderly murder victim was beaten to death with a blunt object and his hands showed that he had attempted to defend himself). Similarly, the state court's findings that respondent's victims had been "brutally beaten to death by multiple crushing blows to the skulls," that "[b]lood was spattered throughout the house," and that the victims were helpless, 665 S. W. 2d, at 94–95, accord with the reasons that the state court had previously found sufficient to support findings of depravity of mind. See *Melson*, *supra*, at 367; *State* v. *Groseclose*, 615 S. W. 2d 142, 151 (Tenn. 1981); *Strouth* v. *State*, 999 S. W. 2d 759, 766 (Tenn. 1999). In sum, a review of the state court's previous decisions interpreting and applying the narrowed construction of the "heinous, atrocious, or cruel" aggravator leaves little doubt that the State Supreme Court applied that same construction in respondent's case.[7]

The only remaining question is whether the narrowing construction that the Tennessee Supreme Court applied was

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[7] We find additional support for this conclusion in the fact that respondent's argument to the State Supreme Court relied squarely on a case in which that court had expressly formulated its narrowing construction of the aggravating circumstance and had applied that construction to the benefit of the defendant. See Brief for Appellant in No. 02C019403CR00052 (Sup. Ct. Tenn. 1983), p. 20 (arguing, based on *State* v. *Pritchett*, 621 S. W. 2d 127 (Tenn. 1981), that "the State did not show . . . that the victims suffered"). Likewise, the two cases the State relied upon in response to respondent's argument also expressly applied a narrowing construction of the "heinous, atrocious, or cruel" aggravator. See Brief for Appellee in No. 02C019403CR00052 (Sup. Ct. Tenn. 1983), p. 34 (citing *Pritchett*, *supra*, and *State* v. *Melson*, 638 S. W. 2d 342, 367 (Tenn. 1982)).

itself unconstitutionally vague. See *Walton*, *supra*, at 654; *Godfrey*, 446 U. S., at 428. It was not. In *State* v. *Dicks*, 615 S. W. 2d 126 (Tenn. 1981), the state court adopted the exact construction of the aggravator that we approved in *Proffitt*, 428 U. S., at 255: that the aggravator was "directed at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,'" *Dicks*, *supra*, at 132. See also *Sochor* v. *Florida*, 504 U. S. 527, 536 (1992). In light of *Proffitt*, we think this interpretation of the aggravator, standing alone, would be sufficient to overcome the claim that the aggravating circumstance applied by the state court was "contrary to" clearly established federal law under 28 U. S. C. § 2254(d)(1).

The State Supreme Court's subsequent application of this aggravating circumstance, as construed in *Dicks*, stands as further proof that it could be applied meaningfully to narrow the class of death-eligible offenders. Later in the year that *Dicks* was decided, the court elaborated on the meaning of the aggravator:

> "Although the Tennessee aggravating circumstances *[sic]* [that the murder was heinous, atrocious, or cruel] does not contain the phrase, 'an aggravated battery to the victim[,]' it is clear that a constitutional construction of this aggravating circumstance requires evidence that the defendant inflicted torture on the victim before death or that [the] defendant committed acts evincing a depraved state of mind; that the depraved state of mind or the torture inflicted must meet the test of heinous, atrocious, or cruel." *Pritchett*, 621 S. W. 2d, at 139 (citation omitted).

With respect to the meaning of "torture," the court held that the aggravator was not satisfied where the victim dies instantly, *ibid.*, but that it was where "the uncontradicted proof shows that [the victim] had defensive injuries to her arms and hands, proving that there was time for her to real-

ize what was happening, to feel fear, and to try to protect herself," *Melson*, 638 S. W. 2d, at 367. Accord, *Cartwright*, 486 U. S., at 364–365 (approving the limitation of the "heinous, atrocious, or cruel" aggravating circumstance to killings in which the victim suffered "some kind of torture or serious physical abuse" prior to the murder). As to "depravity of mind," the court held the fact that the defendant fired a second shotgun blast into a victim after he was dead to be insufficient as a matter of law, see *Pritchett*, *supra*, at 139 (explaining that the depravity in such an action falls short of that exhibited by the defendant in *Godfrey*, *supra*), but concluded that, "a killing wherein the victim is struck up to thirty times, causing an entire room to be covered with a spray of flying blood, and causing the victim's brains to extrude through the gaping hole in her skull," sufficed, *Melson*, *supra*, at 367.[8] In light of these holdings, we are satisfied that the State's aggravating circumstance, as construed by the Tennessee Supreme Court, ensured that there was a "principled basis" for distinguishing between those cases in which the death penalty was assessed and those cases in which it was not. *Arave* v. *Creech*, 507 U. S. 463, 474 (1993).

In sum, even assuming that the Court of Appeals was correct to conclude that the State's statutory aggravating circumstance was facially vague, the court erred in presuming that the State Supreme Court failed to cure this vagueness by applying a narrowing construction on direct appeal. The state court did apply such a narrowing construction, and that

[8] See also *State* v. *Groseclose*, 615 S. W. 2d 142, 151 (Tenn. 1981) (holding that raping and stabbing a victim, before killing her by locking her in a car trunk in the summer, satisfied the "heinous, atrocious, or cruel" aggravating circumstance); *Strouth* v. *State*, 999 S. W. 2d 759, 766 (Tenn. 1999) (quoting the State Supreme Court's 1981 opinion denying rehearing, which held that cutting the throat of a victim already rendered unconscious demonstrated "depravity of mind" in that it was "cold-blooded, intentional, conscienceless and pitiless"); *State* v. *Dicks*, 615 S. W. 2d 126, 132 (Tenn. 1981) (affirming the jury's application of the "heinous, atrocious, or cruel" aggravator to the same crime).

construction satisfied constitutional demands by ensuring that respondent was not sentenced to death in an arbitrary or capricious manner. See *Godfrey*, *supra*, at 428. The state court's affirmance of respondent's sentence on this ground was therefore not "contrary to . . . clearly established Federal law," 28 U. S. C. § 2254(d)(1), and the Court of Appeals was without power to issue a writ of habeas corpus. We reverse the judgment of the Sixth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

The Sixth Circuit assumed that the Tennessee Supreme Court, on direct appeal, adjudicated the merits of respondent's vagueness claim. See 359 F. 3d 785, 791–794 (2004); see also *ante*, at 451. This Court indulges the same assumption. See *ante*, at 456–457, 459 and this page. I agree with the Court that, once the highest court of a State has dispositively decided a point of law, it is not incumbent on that court to cite its precedential decision in every case thereafter presenting the same issue in order to demonstrate its adherence to the pathmarking decision.

Today's decision, as I comprehend it, is confined to the situation the Sixth Circuit posited, one in which the state court has confronted and decided an issue governed by a prior ruling. This Court's opinion, it bears emphasis, does not grapple with the following scenario: A state prisoner petitions for federal habeas review after exhausting his state remedies. In the anterior state proceeding, the prisoner raised multiple issues. The state court, in disposing of the case, left one or more of the issues unaddressed. There would be no warrant, in such a case, for an assumption that the state court, *sub silentio*, considered the issue and resolved it on the merits in accord with the State's relevant law. Nothing in the record would discount the possibil-

ity that the issue was simply overlooked. A federal court would act arbitrarily if it assumed that an issue raised in state court was necessarily decided there, despite the absence of any indication that the state court itself adverted to the point.

Syllabus

SMITH *v.* MASSACHUSETTS

CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS

No. 03–8661. Argued December 1, 2004—Decided February 22, 2005

Petitioner was tried before a Massachusetts jury on charges related to a shooting, including unlawful possession of a firearm. At the conclusion of the prosecution's case, petitioner moved for a not-guilty finding on the firearm count because "the evidence [was] insufficient as a matter of law to sustain a conviction," Mass. Rule Crim. Proc. 25(a). The trial judge granted the motion, finding no evidence to support the requirement of the unlawful possession count that the firearm have a barrel shorter than 16 inches. The prosecution rested, and the trial proceeded on the other counts. Before closing argument, the prosecution argued that under Massachusetts precedent, the victim's testimony that the defendant shot him with a "pistol" or "revolver" sufficed to establish barrel length. The judge "reversed" her previous ruling, allowing the firearm count to go to the jury. The jury convicted petitioner on all counts. In affirming, the Massachusetts Appeals Court held that the Double Jeopardy Clause was not implicated because the trial judge's correction of her ruling had not subjected petitioner to a second prosecution or proceeding, and held that Rule 25 did not prohibit the judge from reconsidering her decision.

Held:

1. Submitting the firearm count to the jury plainly subjected petitioner to further "factfinding proceedings going to guilt or innocence," which are prohibited following a midtrial acquittal by the court, *Smalis* v. *Pennsylvania*, 476 U. S. 140, 145. The ruling here met the definition of an acquittal consistently used in this Court's double-jeopardy cases. In *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, this Court rejected reasoning identical to the Commonwealth's claim that jeopardy did not terminate midtrial because the judge's determination was legal rather than factual. How Massachusetts characterizes the ruling is not binding on this Court. *Smalis*, *supra*, at 144, n. 5. What matters is that, as the Massachusetts Rules authorize, the judge "evaluated the [Commonwealth's] evidence and determined that it was legally insufficient to sustain a conviction." *Martin Linen*, *supra*, at 572. Pp. 466–469.

2. The Double Jeopardy Clause forbade the judge to reconsider the acquittal later in the trial. While the Clause may permit States to create a procedure for reconsidering a midtrial determination of insuffi-

ciency of proof, Massachusetts had no such procedure at the time of petitioner's trial. Its Rules allowed only clerical errors, or those "arising from oversight or omission," to be corrected at any time. Mass. Rule Crim. Proc. 42. A few Commonwealth cases have provided that interlocutory rulings are subject to reconsideration, but these cases, without more, do not extend that principle to a not-guilty finding under Rule 25, which purports not to be interlocutory but to end the case. A seeming dismissal may induce a defendant to present a defense to the undismissed charges when he would be better advised to stand silent. The Double Jeopardy Clause cannot be allowed to become a potential snare for those who reasonably rely on it. If, after a facially unqualified midtrial acquittal on one count, the trial has proceeded to the defendant's introduction of evidence on the remaining counts, the acquittal must be treated as final, unless the availability of reconsideration has been plainly established by pre-existing rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence. Pp. 469–475.

58 Mass. App. 166, 788 N. E. 2d 977, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY and BREYER, JJ., joined, *post*, p. 475.

David Nathanson argued the cause and filed briefs for petitioner.

Cathryn A. Neaves, Assistant Attorney General of Massachusetts, argued the cause for respondent. With her on the brief were *Thomas F. Reilly*, Attorney General, *Dean A. Mazzone* and *Joseph M. Ditkoff*, Special Assistant Attorneys General, and *David M. Lieber*, Assistant Attorney General.

Sri Srinivasan argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Wray*, and *Deputy Solicitor General Dreeben*.*

**Andrew H. Schapiro* and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Idaho et al. by *Lawrence G. Wasden*, Attorney General of Idaho, and *Kenneth K. Jorgensen*, *Lori A. Fleming*, and *Jessica M. Borup*, Deputy Attor-

JUSTICE SCALIA delivered the opinion of the Court.

Midway through a jury trial, the judge acquitted petitioner of one of the three offenses charged. The question presented in this case is whether the Double Jeopardy Clause forbade the judge to reconsider that acquittal later in the trial.

I

Petitioner Melvin Smith was tried before a jury in the Superior Court of Suffolk County, Massachusetts, on charges relating to the shooting of his girlfriend's cousin. The indictments charged three counts: armed assault with intent to murder; assault and battery by means of a dangerous weapon; and unlawful possession of a firearm. The "firearm" element of the last offense requires proof that the weapon had a barrel "less than 16 inches" in length. See Mass. Gen. Laws Ann., ch. 140, § 121 (West 2002) (definition of "firearm"); ch. 269, § 10(a) (West 2000). The indictment in petitioner's case so charged. Petitioner's girlfriend was tried before the same jury as an accessory after the fact.

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neys General, *Troy King*, Attorney General of Alabama, *Gregg D. Renkes*, Attorney General of Alaska, *Terry Goddard*, Attorney General of Arizona, *M. Jane Brady*, Attorney General of Delaware, *Mark J. Bennett*, Attorney General of Hawaii, *Lisa Madigan*, Attorney General of Illinois, *Tom Miller*, Attorney General of Iowa, *Mike McGrath*, Attorney General of Montana, *Jon Bruning*, Attorney General of Nebraska, *Brian Sandoval*, Attorney General of Nevada, *Kelly A. Ayotte*, Attorney General of New Hampshire, *Wayne Stenehjem*, Attorney General of North Dakota, *Jim Petro*, Attorney General of Ohio, *W. A. Drew Edmondson*, Attorney General of Oklahoma, *Hardy Myers*, Attorney General of Oregon, *Gerald J. Pappert*, Attorney General of Pennsylvania, *Patrick C. Lynch*, Attorney General of Rhode Island, *Mark L. Shurtleff*, Attorney General of Utah, *William H. Sorrell*, Attorney General of Vermont, *Jerry W. Kilgore*, Attorney General of Virginia, and *William E. Thor*, State Solicitor General, and *Darrell V. McGraw, Jr.*, Attorney General of West Virginia; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson*.

The victim testified at trial that petitioner had shot him with "a pistol," specifically "a revolver" that "appeared to be a .32 or a .38." App. 12, 14. The prosecution introduced no other evidence about the firearm.

At the conclusion of the prosecution's case, petitioner moved for a required finding of not guilty on the firearm count, see Mass. Rule Crim. Proc. 25(a) (2002), in part because the Commonwealth had not proved that the gun barrel was less than 16 inches. At sidebar, after hearing argument from the prosecutor, the trial judge granted the motion, reasoning that there was "not a scintilla of evidence" that petitioner had possessed a weapon with a barrel length of less than 16 inches. App. 21. The trial court marked petitioner's motion with the handwritten endorsement "Filed and after hearing, Allowed," and the allowance of the motion was entered on the docket. Consolidated Brief and Record Appendix for Defendant in No. 00–P–1215 (Mass. App. Ct.), p. A.21; App. 3. The sidebar conference then concluded, and the prosecution rested.[1] The judge did not notify the jury of petitioner's acquittal on the firearm count.

The defense case then proceeded. Petitioner's codefendant presented one witness, and both defendants then rested. During the short recess before closing arguments, the prosecutor brought to the court's attention a Massachusetts precedent under which (he contended) the victim's testimony about the kind of gun sufficed to establish that the barrel was shorter than 16 inches. He requested that the court defer ruling on the sufficiency of the evidence until after the jury verdict. The judge agreed, announcing orally that she was "reversing" her previous ruling and allowing the firearm-possession count to go to the jury. *Id.*, at 75. Cor-

[1] Although, before the judge ruled, the prosecutor had said that he would "be requesting to reopen and allow [the victim] to testify to" the barrel length, App. 22, he made no motion to reopen before resting his case.

responding notations were made on the original of petitioner's motion and on the docket.

The jury convicted petitioner on all three counts, though it acquitted his codefendant of the accessory charge. Petitioner then submitted to a bench trial on an additional repeat-offender element of the firearm-possession charge; the judge found him guilty. Petitioner received a sentence of 10 to 12 years' incarceration on the firearm-possession charge, concurrent with his sentence on the other counts.

Petitioner sought review in the Appeals Court of Massachusetts. That court affirmed, holding that the Double Jeopardy Clause was not implicated because the trial judge's correction of her ruling had not subjected petitioner to a second prosecution or proceeding. It also rejected petitioner's argument that the trial judge's initial ruling was final because Massachusetts Rule of Criminal Procedure 25(a) required the judge to decide petitioner's motion when it was made, without reserving decision;[2] the court reasoned that the Rule does not preclude the judge from reconsidering. 58 Mass. App. 166, 170–171, 788 N. E. 2d 977, 982–983 (2003).

The Supreme Judicial Court of Massachusetts denied further appellate review. 440 Mass. 1104, 797 N. E. 2d 380 (2003). We granted certiorari. 542 U. S. 903 (2004).

II

Although the common-law protection against double jeopardy historically applied only to charges on which a jury had rendered a verdict, see, *e. g.*, 2 M. Hale, Pleas of the Crown

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[2] The Rule provides in pertinent part:

"The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. *If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time.*" (Emphasis added.)

*246, we have long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict. See *Richardson* v. *United States*, 468 U. S. 317, 325, n. 5 (1984); *Sanabria* v. *United States*, 437 U. S. 54, 64, n. 18 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 573 (1977); *United States* v. *Sisson*, 399 U. S. 267, 290 (1970). This is so whether the judge's ruling of acquittal comes in a bench trial or, as here, in a trial by jury. See *Fong Foo* v. *United States*, 369 U. S. 141, 143 (1962) *(per curiam)*; *Sanabria*, *supra*, at 77–78; *Martin Linen*, *supra*, at 565–566, 574–575.

Our cases have made a single exception to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury: When a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty. *United States* v. *Wilson*, 420 U. S. 332, 352–353 (1975). But if the prosecution has not yet obtained a conviction, further proceedings to secure one are impermissible: "[S]ubjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis* v. *Pennsylvania*, 476 U. S. 140, 145 (1986).

When the judge in this case first granted petitioner's motion, there had been no jury verdict. Submission of the firearm count to the jury plainly subjected petitioner to further "factfinding proceedings going to guilt or innocence," prohibited by *Smalis* following an acquittal. The first question, then, is whether the judge's initial ruling on petitioner's motion was, in fact, a judgment of acquittal.

It certainly appeared to be. Massachusetts Rule of Criminal Procedure 25(a) directs the trial judge to enter a finding of not guilty "if the evidence is insufficient as a matter of law to sustain a conviction." An order entering such a finding

thus meets the definition of acquittal that our double-jeopardy cases have consistently used: It "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen, supra,* at 571; accord, *e. g., Price* v. *Vincent,* 538 U. S. 634, 640 (2003); *Burks* v. *United States,* 437 U. S. 1, 10 (1978).

The Commonwealth contends that the grant of a motion for a required finding of not guilty in a jury trial is a purely legal determination, the factfinding function being reserved to the jury. Brief for Respondent 14 (citing *Commonwealth* v. *Lowder,* 432 Mass. 92, 96–97, 731 N. E. 2d 510, 515 (2000)). Thus, the Commonwealth reasons, jeopardy did not terminate midtrial on any of the three counts, since neither judge nor jury had rendered a factual determination that would bring jeopardy to an end. We rejected identical reasoning in *Martin Linen, supra,* holding that jeopardy ends when, following discharge of a hung jury, a judge grants a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. Rule 29 created the judge-ordered "judgment of acquittal" in place of the directed verdict, which was at least fictionally returned by the jury at the judge's direction, rather than coming from the judge alone. But, we said in *Martin Linen,* change in nomenclature and removal of the jury's theoretical role make no difference; the Rule 29 judgment of acquittal is a substantive determination that the prosecution has failed to carry its burden. Thus, even when the jury is the *primary* factfinder, the trial judge still resolves elements of the offense in granting a Rule 29 motion in the absence of a jury verdict. See *Martin Linen, supra,* at 571–575.

The same is true here. (Indeed, Massachusetts patterned its Rule 25 on Federal Rule 29 and adopted prior directed-verdict practice without change. See *Lowder, supra,* at 95, 731 N. E. 2d, at 514.) Massachusetts' characterization of the required finding of not guilty as a legal rather than factual determination is, "as a matter of double jeopardy law, . . .

not binding on us," *Smalis, supra,* at 144, n. 5; what matters is that, as the Massachusetts Rules authorize, the judge "evaluated the [Commonwealth's] evidence and determined that it was legally insufficient to sustain a conviction." *Martin Linen, supra,* at 572.

III

Having concluded that the judge acquitted petitioner of the firearm-possession charge,[3] we must turn to the more difficult question whether the Double Jeopardy Clause permitted her to reconsider that acquittal once petitioner and his codefendant had rested their cases.[4]

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[3] It is of no moment that jeopardy continued on the two assault charges, for which the jury remained empaneled. Double-jeopardy analysis focuses on the individual "offence" charged, U. S. Const., Amdt. 5, and our cases establish that jeopardy may terminate on some counts even as it continues on others. See, *e. g., Price* v. *Georgia,* 398 U. S. 323, 329 (1970).

[4] The dissent emphasizes that the acquittal was reconsidered "before the court of first instance ha[d] disassociated itself from the case or any issue in it," whereas in *Smalis* v. *Pennsylvania,* 476 U. S. 140 (1986), the government sought reconsideration by appealing. *Post,* at 477–478 (opinion of GINSBURG, J.). That distinction is not a relevant one. *Smalis* squarely held, not that further factfinding proceedings were barred because there had been an appeal, but that appeal was barred because further factfinding proceedings before the trial judge (the factfinder who had pronounced the acquittal) were impermissible. 476 U. S., at 145. Likewise, we recognized in *Justices of Boston Municipal Court* v. *Lydon,* 466 U. S. 294 (1984), that in a "two-tier" trial system amounting to "'a single, continuous course of judicial proceedings,'" acquittal at the first stage cannot be reconsidered later in the two-tier process. *Id.,* at 309, 312. These cases establish that an acquittal, once final, may not be reconsidered on appeal or otherwise.

The dissent misses the point of *Swisher* v. *Brady,* 438 U. S. 204 (1978), which found no double-jeopardy bar to a judge's review of a master's findings. This was not a "recogni[tion of] the distinction between appeals and continuing proceedings before the initial tribunal," *post,* at 478, but rather a recognition that the initial jeopardy does not end until there is a *final* decision. See 438 U. S., at 216 ("[I]t is for the State, not the parties, to designate and empower the factfinder and adjudicator. And here

It is important to note, at the outset, that the facts of this case gave petitioner no reason to doubt the finality of the state court's ruling. The prosecutor did not make or reserve a motion for reconsideration, or seek a continuance that would allow him to provide the court with favorable authority. Rather, the sidebar conference concluded, the court asked the prosecutor if he had "any further evidence," and he replied, "No. At this point, the Commonwealth rests their case." App. 22. Nor did the court's ruling appear on its face to be tentative. The trial court was not permitted by Massachusetts procedure to defer ruling on petitioner's motion, Mass. Rule Crim. Proc. 25(a), or to require the defendants to go forward with their cases while the prosecution reserved the right to present more evidence, *Commonwealth* v. *Cote*, 15 Mass. App. 229, 242, 444 N. E. 2d 1282, 1290–1291 (1983). And when the prosecutor suggested that he be given a chance to reopen his case before the defendants proceeded, the court rejected the suggestion because it was time to rule on petitioner's motion. App. 22; n. 1, *supra*.

Was this apparently final ruling in fact final? We think, and petitioner does not dispute, see Tr. of Oral Arg. 5, that as a general matter state law may prescribe that a judge's midtrial determination of the sufficiency of the State's proof can be reconsidered. Cf. *Pennsylvania* v. *Goldhammer*, 474 U. S. 28, 30 (1985) *(per curiam)* (state law regarding appealability may affect defendant's expectation that a sentence is final for double-jeopardy purposes). We can find no instance in which a State has done this by statute or rule, but some

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Maryland has conferred those roles only on the Juvenile Court judge. Thus, regardless of which party is initially favored by the master's proposals, . . . the judge is empowered to accept, modify, or reject those proposals"). The dissent is quite right that the taking of an appeal "necessarily signals" the finality of the order appealed, *post*, at 477; that does not establish, however, that the absence of an appeal necessarily connotes the nonfinality that differentiates the master's finding in *Swisher* from the midtrial acquittal in this case.

state courts have held, as a matter of common law or in the exercise of their supervisory power, that a court-directed judgment of acquittal is not effective until it is signed and entered in the docket, *Harden* v. *State*, 160 Ga. App. 514, 515, 287 S. E. 2d 329, 331 (1981), until a formal order is issued, *State* v. *Collins*, 112 Wash. 2d 303, 308–309, 771 P. 2d 350, 353 (1989), or until the motion hearing is concluded, *Watson* v. *State*, 410 So. 2d 207, 209 (Fla. App. 1982).

At the time of petitioner's trial, however, Massachusetts had not adopted any such rule of nonfinality. Its Rules of Criminal Procedure provided that only *clerical* errors in a judgment or order, or errors "arising from oversight or omission," were subject to correction at any time. Mass. Rule Crim. Proc. 42 (2002). Massachusetts cites a few commonwealth cases supporting the general proposition that interlocutory rulings (rulings on pretrial motions, evidentiary rulings, and the like) are subject to reconsideration. But it is far from obvious that this principle extends to entry of a required finding of not guilty under Rule 25 (or to its common-law predecessor, the directed verdict)—which on its face, at least, purports not to be interlocutory but to end the case. We think much more was required here.

It may suffice for an appellate court to announce the state-law rule that midtrial acquittals are tentative in a case where reconsideration of the acquittal occurred at a stage in the trial where the defendant's justifiable ignorance of the rule could not possibly have caused him prejudice.[5] But when, as here, the trial has proceeded to the defendant's

[5] In *Price* v. *Vincent*, 538 U. S. 634 (2003), a habeas case presenting facts similar to those here, the judge granted a partial acquittal but reconsidered before the trial proceeded, and the Michigan courts concluded that no double-jeopardy violation had occurred. *Id.*, at 637–638. We held that conclusion to be not "an unreasonable application of . . . Federal law," 28 U. S. C. §2254(d)(1), in part because, as the Michigan Supreme Court observed, "no trial proceedings took place with respondent laboring under the mistaken impression that he was not facing the possibility of conviction for" the purportedly acquitted charge. 538 U. S., at 642–643, and n. 1.

presentation of his case, the possibility of prejudice arises. The seeming dismissal may induce a defendant to present a defense to the undismissed charges when he would be better advised to stand silent. Many jurisdictions still follow the traditional rule that after trial or on appeal, sufficiency-of-the-evidence challenges are reviewed on the basis of the *entire* trial record, even if the defendant moved for acquittal when the prosecution rested and the court erroneously denied that motion. *E. g., Smith* v. *State*, 509 P. 2d 1391, 1397 (Okla. Crim. App. 1973); *Deal* v. *State*, 657 P. 2d 404, 405 (Alaska App. 1983) *(per curiam)*. See generally Comment, The Motion for Acquittal: A Neglected Safeguard, 70 Yale L. J. 1151, 1152–1158 (1961). In these jurisdictions, the defendant who puts on a case runs "the risk that . . . he will bolster the Government case enough for it to support a verdict of guilty." *McGautha* v. *California*, 402 U. S. 183, 215 (1971). The defendant's evidence "may lay the foundation for otherwise inadmissible evidence in the Government's initial presentation or provide corroboration for essential elements of the Government's case." *United States* v. *Calderon*, 348 U. S. 160, 164, n. 1 (1954) (citation omitted). In all jurisdictions, moreover, false assurance of acquittal on one count may induce the defendant to present defenses to the remaining counts that are inadvisable—for example, a defense that entails admission of guilt on the acquitted count.[6]

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[6] In multiple-defendant cases like this one, an apparent final dismissal of one defendant may also cause the others to alter their cases in harmful ways. They would, for example, proceed under the mistaken belief that they need no longer fear the acquitted defendant's assertion of a defense antagonistic to their own, and might assume that the acquitted defendant would become available as a defense witness. Cf. *Washington* v. *Texas*, 388 U. S. 14, 22–23 (1967) (discussing reasons to allow testimony of a purported accomplice after accomplice's acquittal). While the potential effect upon codefendants has no bearing upon this petitioner's double-jeopardy claim, it does confirm the wisdom of the rule we adopt.

The Double Jeopardy Clause's guarantee cannot be allowed to become a potential snare for those who reasonably rely upon it. If, after a facially unqualified midtrial dismissal of one count, the trial has proceeded to the defendant's introduction of evidence, the acquittal must be treated as final, unless the availability of reconsideration has been plainly established by pre-existing rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence. That requirement was not met here. The Commonwealth has failed to show that under state procedure as it existed at the time of petitioner's trial, the trial court's ruling on the motion for a required finding of not guilty was automatically, or even presumptively, nonfinal. At most it has shown that the ruling was wrong because the Commonwealth's evidence was, as a matter of law, sufficient—a point that the dissent emphasizes, echoing the opinion below. See *post*, at 476–477, 479. But any contention that the Double Jeopardy Clause must itself (even absent provision by the State) leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a preverdict acquittal that is patently wrong in law. See, *e. g.*, *Smalis*, 476 U. S., at 144, n. 7; *Sanabria*, 437 U. S., at 68–69, 75, 78; *Martin Linen*, 430 U. S., at 571; *Fong Foo*, 369 U. S., at 143.[7]

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[7] The dissent goes to great lengths to establish that there was no prejudice here, since the acquittal was legally wrong and the defendant was deprived of no available defense. See *post*, at 476–480. But the Double Jeopardy Clause has never required prejudice beyond the very exposure to a second jeopardy. To put it differently: Requiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause—even when the acquittal was erroneous because the evidence was sufficient. See, *e. g.*, *Sanabria* v. *United States*, 437 U. S. 54, 77–78 (1978). Of course it is not even clear that the dissent's due-process analysis would acknowledge prejudice when a midtrial acquittal was correct when rendered, so long as evidence sufficient to sustain the charge was eventually introduced (after the acquittal and during the defendant's case, see *supra*, at 472). Our double-jeopardy cases make clear that an acquittal bars the prosecution from seeking "an-

Massachusetts argues that if the Double Jeopardy Clause does not allow for reconsideration, every erroneous grant of a directed-verdict motion will be unremediable, even one attributable to mistaken expression that is promptly corrected. We think not. Double-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal, even one rendered by a jury. See M. Friedland, Double Jeopardy 61 (1969); *King* v. *Parkin*, 1 Mood. 45, 46–47, 168 Eng. Rep. 1179, 1180 (1824). And of course States can protect themselves still further against the "occasional errors" of law that the dissent thinks "inevitabl[e]" in the course of trial, *post*, at 478, by rendering midtrial acquittals nonfinal. (Massachusetts, as we have observed, has specifically provided for the correction of mistaken utterances or scrivener's errors, but not for the reconsideration of legal conclusions. See Mass. Rule Crim. Proc. 42 (2002).)

Prosecutors are not without protection against ill-considered acquittal rulings. States can and do craft procedural rules that allow trial judges "the maximum opportunity to consider with care a pending acquittal motion," *Martin Linen*, *supra*, at 574, including the option of deferring consideration until after the verdict. See, *e. g.*, D. C. Super. Ct. Crim. Proc. Rule 29(b) (2003); N. Y. Crim. Proc. Law Ann. § 290.10(1)(b) (West 2002); W. Va. Rule Crim. Proc. 29(b) (2004). (At least one State has altogether precluded midtrial acquittals by the court. See Nev. Rev. Stat. Ann. § 175.381(1) (2001).) Moreover, a prosecutor can seek to persuade the court to correct its legal error before it rules, or at least before the proceedings move forward. See *Price* v. *Vincent*, 538 U. S., at 637–638, 642–643, and n. 1. Indeed, the prosecutor in this case convinced the judge to reconsider her acquittal ruling on the basis of legal authority he had obtained during a 15-minute recess before closing argu-

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other opportunity to supply evidence which it failed to muster" before jeopardy terminated. *Burks* v. *United States*, 437 U. S. 1, 11 (1978).

ments. See App. 71–72, 74. Had he sought a short continuance at the time of the acquittal motion, the matter could have been resolved satisfactorily before petitioner went forward with his case.

* * *

The judgment of the Appeals Court of Massachusetts is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join, dissenting.

Does the Double Jeopardy Clause bar the States from allowing trial judges to reconsider a midtrial grant of a motion to acquit on one or more but fewer than all counts of an indictment? The Court unanimously answers "No." See *ante*, at 470 ("[A]s a general matter state law may prescribe that a judge's midtrial determination of the sufficiency of the State's proof can be reconsidered."). A State may provide for such reconsideration, the Court also recognizes, by legislation or by judicial rule, common-law decision, or exercise of supervisory power. See *ante*, at 470–471. According to the Appeals Court of Massachusetts, the Commonwealth has so provided through its decisional law. 58 Mass. App. 166, 171, 788 N. E. 2d 977, 983 (2003); see *Commonwealth* v. *Haskell*, 438 Mass. 790, 792, 784 N. E. 2d 625, 628 (2003) ("A judge's power to reconsider his own decisions during the pendency of a case is firmly rooted in the common law . . . ."). The view held by the Massachusetts court on this issue is hardly novel. See, *e. g.*, *United States* v. *LoRusso*, 695 F. 2d 45, 53 (CA2 1982) ("A district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment . . . ."); cf. Fed. Rule Civ. Proc. 54(b) (Absent "entry of a final judgment as to one or more but fewer than all of the claims or parties," "any order or other form of decision, however designated, which adjudicates fewer

than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.").

Nevertheless, the trial court here was locked into its on-the-spot error, the Court maintains, because "the availability of reconsideration [had not] been plainly established by pre-existing rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence." *Ante*, at 473. Otherwise, according to the Court, "[t]he Double Jeopardy Clause's guarantee [would] become a potential snare for those who reasonably rely upon it." *Ibid.*

I agree that, as a trial unfolds, a defendant must be accorded a timely, fully informed opportunity to meet the State's charges. I would so hold as a matter not of double jeopardy, but of due process. See *Gray* v. *Netherland*, 518 U. S. 152, 171 (1996) (GINSBURG, J., dissenting) ("Basic to due process in criminal proceedings is the right to a full, fair, potentially effective opportunity to defend against the State's charges."). On the facts presented here, however, as the Massachusetts Appeals Court observed, see 58 Mass. App., at 171, 788 N. E. 2d, at 983, defendant-petitioner Smith suffered no prejudice fairly attributable to the trial court's error.

The trial judge in Smith's case acted impatiently and made a mistake at the close of the Commonwealth's case. Cutting short the prosecutor's objections, see App. 20–22, she granted Smith's motion for a "required finding of not guilty" on one of the three charges contained in the indictment, unlawful possession of a firearm, *id.*, at 20.[1] She did so on the ground that the Commonwealth had failed to prove an essen-

[1] The other charges, on which no motion to acquit was made, were assault with intent to murder, and assault and battery by means of a dangerous weapon.

tial element of the crime, *i. e.*, that the barrel of the gun Smith was charged with possessing was less than 16 inches. See Mass. Gen. Laws Ann., ch. 269, § 10(a) (West 2000) (rendering possession of a "firearm," unless exempted, unlawful); ch. 140, § 121 (West 2002) (defining "firearm" as a "pistol" or "revolver" with a barrel length "less than 16 inches"). The ruling for Smith was endorsed on the motion and recorded on the docket, but it was not communicated to the jury.

The trial judge corrected her error the same day it was made. She did so in advance of closing arguments and her charge to the jury. See App. 71–74. The trial judge retracted her initial ruling and denied the motion for a required finding of not guilty because the prosecutor had called to her attention a decision of the Supreme Judicial Court of Massachusetts directly on point, *Commonwealth* v. *Sperrazza*, 372 Mass. 667, 363 N. E. 2d 673 (1977). In that case, Massachusetts' highest court held that a jury may infer a barrel length of less than 16 inches from testimony that the weapon in question was a revolver or handgun. *Id.*, at 670, 363 N. E. 2d, at 675. Here, there was such testimony. The victim in Smith's case had testified that the gun he saw in the defendant's hand was a ".32 or .38" caliber "pistol." App. 12. The trial court's new ruling based on *Sperrazza* was entered on the docket, Smith did not move to reopen the case, and the jury convicted him on all charges.

Smith urges that our decision in *Smalis* v. *Pennsylvania*, 476 U. S. 140 (1986), controls this case. I disagree. In *Smalis*, the Court held that the Double Jeopardy Clause bars appellate review of a trial court's grant of a motion to acquit, because reversal would lead to a remand for further trial proceedings. *Id.*, at 146. An appeal, including an interlocutory appeal, moves a case from a court of first instance to an appellate forum, and necessarily signals that the trial court has ruled with finality on the appealed issue or issues. A trial court's reconsideration of its initial decision to grant a motion, on the other hand, occurs before the court of first

instance has disassociated itself from the case or any issue in it. Trial courts have historically revisited midtrial rulings, as earlier noted, see *supra*, at 475–476, for the practical exigencies of trial mean that judges inevitably will commit occasional errors. In contrast, the government traditionally could pursue no appeal at any stage of a criminal case, however mistaken the trial court's prodefense ruling. See *United States* v. *Scott*, 437 U. S. 82, 84–86 (1978) (discussing the evolution of the Government's right to appeal). This Court has long recognized the distinction between appeals and continuing proceedings before the initial tribunal prior to the rendition of a final adjudication. Compare Fed. Rule Civ. Proc. 54(b), quoted *supra*, at 475–476, and *Swisher* v. *Brady*, 438 U. S. 204, 215–216 (1978) (no double jeopardy bar to the State's exceptions to a master's findings where an accused juvenile "is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge"), with *Kepner* v. *United States*, 195 U. S. 100, 133 (1904) (Double Jeopardy Clause bars the Government's appeal to a higher court after acquittal of the defendant by the "court of first instance").

Nor is Massachusetts Rule of Criminal Procedure 25(a) (2002) dispositive here. That Rule states: "If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, *it shall be ruled upon at that time.*" (Emphasis added.) While Rule 25(a) plainly instructs an immediate ruling on the motion, it says nothing about reconsideration.

The Appeals Court of Massachusetts determined that Rule 25(a) did not place the incorrect midtrial ruling beyond the trial court's capacity to repair its error. Rule 25(a)'s demand for an immediate ruling rather than reservation of the question,[2] the Appeals Court said, "protects a defendant's right

[2] Cf. Fed. Rule Crim. Proc. 29(b) (providing that a trial court may reserve decision on a defendant's challenge to the sufficiency of the evidence

to insist that the Commonwealth present proof of every element of the crime with which he is charged before he decides whether to rest or to introduce proof." 58 Mass. App., at 171, 788 N. E. 2d, at 982–983 (quoting *Commonwealth* v. *Cote*, 15 Mass. App. 229, 240, 444 N. E. 2d 1282, 1289 (1983)).[3] That protection was accorded the defendant here, the court observed, for the Commonwealth's evidence, presented before the "required finding of not guilty" motion was made and granted, in fact sufficed to prove every element of the firearm possession charge. See 58 Mass. App., at 171, 788 N. E. 2d, at 983. Rule 25(a) does not import more, the Appeals Court indicated. Because the jury remained seated with no break in the trial, and the defendant retained the opportunity to counter the Commonwealth's case,[4] that court concluded, neither Rule 25(a) nor the Double Jeopardy Clause froze as final the erroneous midtrial ruling on the firearm possession charge. I would not pretend to comprehend Rule 25(a) or Massachusetts' decisional law regarding state practice better than the Massachusetts Appeals Court did.

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until after the jury has returned a verdict). Several States follow the federal model. See, *e. g.*, Alaska Rule Crim. Proc. 29(b) (2004); Del. Super. Ct. Rule Crim. Proc. 29(b) (2004); Iowa Rule Crim. Proc. 2.19(8)(b) (2004); N. Y. Crim. Proc. Law Ann. § 290.10(1) (West 2002); W. Va. Rule Crim. Proc. 29(b) (2004).

[3] Counsel for petitioner suggested at oral argument that the protection is more theoretical than real, for "what [judges] do as . . . a matter of practice in Massachusetts is they simply deny [the motion]." Tr. of Oral Arg. 56 (also noting that the motion to acquit may be renewed at the close of defendant's case and after the jury has returned a verdict).

[4] The Court hypothesizes that dismissal of one count might affect a defendant's course regarding the undismissed charges. *Ante*, at 472. The Appeals Court addressed that prospect concretely: Defendant Smith "has not suggested that the initial allowance of the motion affected his trial strategy with regard to the other charges." 58 Mass. App. 166, 171, 788 N. E. 2d 977, 983 (2003). Further, there is not even the slightest suggestion that Smith's codefendant, who was acquitted by the jury, "alter[ed] [her case] in harmful ways." But see *ante*, at 472, n. 6.

In sum, Smith was subjected to a single, unbroken trial proceeding in which he was denied no opportunity to air his defense before presentation of the case to the jury. I would not deny prosecutors in such circumstances, based on a trial judge's temporary error, *one* full and fair opportunity to present the State's case.

Syllabus

STEWART *v.* DUTRA CONSTRUCTION CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 03–814. Argued November 1, 2004—Decided February 22, 2005

As part of a project to extend the Massachusetts Turnpike, respondent Dutra Construction Company dug a trench beneath Boston Harbor using its dredge, the *Super Scoop*, a floating platform with a bucket that removes silt from the ocean floor and dumps it onto adjacent scows. The *Super Scoop* has limited means of self-propulsion, but can navigate short distances by manipulating its anchors and cables. When dredging the trench here, it typically moved once every couple of hours. Petitioner, a marine engineer hired by Dutra to maintain the *Super Scoop*'s mechanical systems, was seriously injured while repairing a scow's engine when the *Super Scoop* and the scow collided. He sued Dutra under the Jones Act, alleging that he was a seaman injured by Dutra's negligence, and under § 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. § 905(b), which authorizes covered employees to sue a "vessel" owner as a third party for an injury caused by the owner's negligence. The District Court granted Dutra summary judgment on the Jones Act claim, and the First Circuit affirmed. On remand, the District Court granted Dutra summary judgment on the LHWCA claim. In affirming, the First Circuit noted that Dutra had conceded that the *Super Scoop* was a "vessel" under § 905(b), but found that Dutra's alleged negligence had been committed in its capacity as an employer and not as the vessel's owner.

Held: A dredge is a "vessel" under the LHWCA. Pp. 487–497.

(a) Congress enacted the Jones Act in 1920 to remove the bar to negligence suits by seamen. Although that Act does not define "seaman," the maritime law backdrop at the time it was passed shows that "seaman" is a term of art with an established meaning under general maritime law. The LHWCA, enacted in 1927 to provide scheduled compensation to land-based maritime workers but not to "a master or member of a crew of any vessel," 33 U. S. C. § 902(3)(G), works in tandem with the Jones Act: The Jones Act provides tort remedies to sea-based maritime workers and the LHWCA provides workers' compensation to land-based maritime employees. In *McDermott Int'l, Inc.* v. *Wilander*, 498 U. S. 337, and *Chandris, Inc.* v. *Latsis*, 515 U. S. 347, this Court addressed the relationship a worker must have to a vessel in order to be a "master or member" of its crew. Now the Court turns to the other

half of the LHWCA's equation: determining whether a watercraft is a vessel. Pp. 487–488.

(b) The LHWCA did not define "vessel" when enacted, but §§ 1 and 3 of the Revised Statutes of 1873 specified that, in any Act passed after February 25, 1871, "'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The LHWCA is such an Act. Section 3's definition has remained virtually unchanged to the present and continues to supply the default definition of "vessel" throughout the U. S. Code. Section 3 merely codified the meaning "vessel" had acquired in general maritime law. In fact, prior to the passage of the Jones Act and the LHWCA, this Court and lower courts had treated dredges as vessels. By the time those Acts became law in the 1920's, it was settled that § 3 defined "vessel" for their purposes, and that a structure's status as a vessel under § 3 depended on whether the structure was an instrument of naval transportation. See *Ellis* v. *United States*, 206 U. S. 246, 259. Then as now, dredges served a waterborne transportation function: In performing their work they carried machinery, equipment, and a crew over water. This Court has continued to treat § 3 as defining "vessel" in the LHWCA and to construe § 3 consistently with general maritime law. *Norton* v. *Warner Co.*, 321 U. S. 565. Pp. 488–492.

(c) *Cope* v. *Vallette Dry Dock Co.*, 119 U. S. 625, and *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U. S. 19, did not adopt a definition of vesselhood narrower than § 3. Rather, they made a sensible distinction between watercraft temporarily stationed in a particular location and those permanently anchored to shore or the ocean floor. A watercraft is not capable of being used for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement. By including special-purpose vessels like dredges, § 3 sweeps broadly, but other prerequisites to qualifying for seaman status under the Jones Act provide some limits. A worker seeking such status must prove that his duties contributed to the vessel's function or mission and that his connection to the vessel was substantial in nature and duration. *Chandris*, *supra*, at 376. Pp. 493–495.

(d) The First Circuit held that the *Super Scoop* is not a "vessel" because its primary purpose is not navigation or commerce and because it was not in actual transit at the time of Stewart's injury. Neither prong of that test is consistent with § 3's text or general maritime law's established meaning of "vessel." Section 3 requires only that a watercraft be "used, or capable of being used, as a means of transportation on water," not that it be used primarily for that purpose. The *Super Scoop* was not only "capable of being used" to transport equipment and

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passengers over water—it was so used. Similarly, requiring a watercraft to be in motion to qualify as a vessel under §3 is the sort of "snapshot" test rejected in *Chandris*. That a vessel must be "in navigation," *Chandris*, *supra*, at 373–374, means not that a structure's locomotion at any given moment matters, but that structures may lose their character as vessels if withdrawn from the water for an extended period. The "in navigation" requirement is thus relevant to whether a craft is "used, or capable of being used," for naval transportation. The inquiry whether a craft is "used, or capable of being used," for maritime transportation may involve factual issues for a jury, but here no relevant facts were in dispute. Dutra conceded that the *Super Scoop* was only temporarily stationary while the scow was being repaired; it had not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport. Finally, Dutra conceded that the *Super Scoop* is a "vessel" under §905(b), which imposes LHWCA liability on vessel owners for negligence to longshoremen. However, the LHWCA does not meaningfully define the term "vessel" in either §902(3)(G) or §905(b), and 1 U. S. C. §3 defines the term "vessel" throughout the LHWCA. Pp. 495–497.

343 F. 3d 10, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which all other Members joined, except REHNQUIST, C. J., who took no part in the decision of the case.

David B. Kaplan argued the cause for petitioner. With him on the briefs were *Thomas M. Bond*, *David W. Robertson*, and *Michael F. Sturley*.

Lisa S. Blatt argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were former *Solicitor General Olson*, *Deputy Solicitor General Hungar*, *Howard M. Radzely*, *Allen H. Feldman*, and *Mark S. Flynn*.

Frederick E. Connelly, Jr., argued the cause for respondent. With him on the brief were *Harvey Weiner* and *John J. O'Connor*.*

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*Briefs of *amici curiae* urging reversal were filed for the Association of Trial Lawyers of America by *John W. deGravelles* and *David S. Casey, Jr.*; for Diamond Offshore Drilling, Inc., et al. by *James Patrick*

JUSTICE THOMAS delivered the opinion of the Court.

The question in this case is whether a dredge is a "vessel" under § 2(3)(G) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat., pt. 2, p. 1425, as added by § 2(a) of Pub. L. 98–426, 33 U. S. C. § 902(3)(G). We hold that it is.

I

As part of Boston's Central Artery/Tunnel Project, or "Big Dig," the Commonwealth of Massachusetts undertook to extend the Massachusetts Turnpike through a tunnel running beneath South Boston and Boston Harbor to Logan Airport. The Commonwealth employed respondent Dutra Construction Company to assist in that undertaking. At the time, Dutra owned the world's largest dredge, the *Super Scoop*, which was capable of digging the 50-foot-deep, 100-foot-wide, three-quarter-mile-long trench beneath Boston Harbor that is now the Ted Williams Tunnel.

The *Super Scoop* is a massive floating platform from which a clamshell bucket is suspended beneath the water. The bucket removes silt from the ocean floor and dumps the sediment onto one of two scows that float alongside the dredge. The *Super Scoop* has certain characteristics common to seagoing vessels, such as a captain and crew, navigational lights, ballast tanks, and a crew dining area. But it lacks others. Most conspicuously, the *Super Scoop* has only limited means of self-propulsion. It is moved long distances by tugboat. (To work on the Big Dig, it was towed from its home base in California through the Panama Canal and up the eastern seaboard to Boston Harbor.) It navigates short distances by manipulating its anchors and cables. When dredging the

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Cooney; and for the United Brotherhood of Carpenters and Joiners of America by *John R. Hillsman* and *John T. DeCarlo.*

Briefs of *amici curiae* urging affirmance were filed for the Signal Mutual Indemnity Association by *John J. Walsh;* and for T. W. LaQuay Dredging, Inc., by *Gus David Oppermann V.*

Boston Harbor trench, it typically moved in this way once every couple of hours, covering a distance of 30-to-50 feet each time.

Dutra hired petitioner Willard Stewart, a marine engineer, to maintain the mechanical systems on the *Super Scoop* during its dredging of the harbor. At the time of Stewart's accident, the *Super Scoop* lay idle because one of its scows, *Scow No. 4*, had suffered an engine malfunction and the other was at sea. Stewart was on board *Scow No. 4*, feeding wires through an open hatch located about 10 feet above the engine area. While Stewart was perched beside the hatch, the *Super Scoop* used its bucket to move the scow. In the process, the scow collided with the *Super Scoop*, causing a jolt that plunged Stewart headfirst through the hatch to the deck below. He was seriously injured.

Stewart sued Dutra in the United States District Court for the District of Massachusetts under the Jones Act, 38 Stat. 1185, as amended, 41 Stat. 1007 and 96 Stat. 1955, 46 U. S. C. App. §688(a), alleging that he was a seaman injured by Dutra's negligence. He also filed an alternative claim under §5(b) of the LHWCA, 33 U. S. C. §905(b), which authorizes covered employees to sue a "vessel" owner as a third party for an injury caused by the owner's negligence.

Dutra moved for summary judgment on the Jones Act claim, arguing that Stewart was not a seaman. The company acknowledged that Stewart was "a member of the [*Super Scoop*'s] crew," 230 F. 3d 461, 466 (CA1 2000); that he spent "[n]inety-nine percent of his time while on the job" aboard the *Super Scoop*, App. 20 (Defendant's Memorandum in Support of Summary Judgment); and that his "duties contributed to the function" of the *Super Scoop*, *id.*, at 32. Dutra argued only that the *Super Scoop* was not a vessel for purposes of the Jones Act. Dutra pointed to the Court of Appeals' en banc decision in *DiGiovanni* v. *Traylor Brothers, Inc.*, 959 F. 2d 1119 (CA1 1992), which held that "if a

barge . . . or other float's purpose or primary business is *not* navigation or commerce, then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit" at the time of the plaintiff's injury. *Id.*, at 1123 (internal quotation marks omitted). The District Court granted summary judgment to Dutra, because the *Super Scoop*'s primary purpose was dredging rather than transportation and because it was stationary at the time of Stewart's injury.

On interlocutory appeal, the Court of Appeals affirmed, concluding that it too was bound by *DiGiovanni*. 230 F. 3d, at 467–468. The court reasoned that the *Super Scoop*'s primary function was construction and that "[a]ny navigation or transportation that may be required is incidental to this primary function." *Id.*, at 468. The court also concluded that the scow's movement at the time of the accident did not help Stewart, because his status as a seaman depended on the movement of the *Super Scoop* (which was stationary) rather than the scow. *Id.*, at 469.

On remand, the District Court granted summary judgment in favor of Dutra on Stewart's alternative claim that Dutra was liable for negligence as an owner of a "vessel" under the LHWCA, 33 U. S. C. § 905(b). The Court of Appeals again affirmed. It noted that Dutra had conceded that the *Super Scoop* was a "vessel" for purposes of § 905(b), explaining that "the LHWCA's definition of 'vessel' is 'significantly more inclusive than that used for evaluating seaman status under the Jones Act.'" 343 F. 3d 10, 13 (CA1 2003) (quoting *Morehead* v. *Atkinson-Kiewit, J/V*, 97 F. 3d 603, 607 (CA1 1996) (en banc)). The Court of Appeals nonetheless agreed with the District Court's conclusion that Dutra's alleged negligence was committed in its capacity as an employer rather than as owner of the vessel under § 905(b).

We granted certiorari to resolve confusion over how to determine whether a watercraft is a "vessel" for purposes of the LHWCA. 540 U. S. 1177 (2004).

II

Prior to the passage of the Jones Act, general maritime law usually entitled a seaman who fell sick or was injured both to maintenance and cure (or the right to be cared for and paid wages during the voyage, see, *e. g.*, *Harden* v. *Gordon*, 11 F. Cas. 480, 482–483 (No. 6,047) (CC Me. 1823) (Story, J.)), and to damages for any "injuries received . . . in consequence of the unseaworthiness of the ship," *The Osceola*, 189 U. S. 158, 175 (1903). Suits against shipowners for negligence, however, were barred. Courts presumed that the seaman, in signing articles of employment for the voyage, had assumed the risks of his occupation; thus a seaman was "not allowed to recover an indemnity for the negligence of the master, or any member of the crew." *Ibid.*

Congress enacted the Jones Act in 1920 to remove this bar to negligence suits by seamen. See *Chandris, Inc.* v. *Latsis*, 515 U. S. 347, 354 (1995). Specifically, the Jones Act provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U. S. C. App. § 688(a).

Although the statute is silent on who is a "seaman," both the maritime law backdrop against which Congress enacted the Jones Act and Congress' subsequent enactments provide some guidance.

First, "seaman" is a term of art that had an established meaning under general maritime law. We have thus presumed that when the Jones Act made available negligence remedies to "[a]ny seaman who shall suffer personal injury in the course of his employment," Congress took the term "seaman" as the general maritime law found it. *Chandris*,

supra, at 355 (citing *Warner* v. *Goltra*, 293 U. S. 155, 159 (1934)); G. Gilmore & C. Black, Law of Admiralty §6–21, pp. 328–329 (2d ed. 1975).

Second, Congress provided further guidance in 1927 when it enacted the LHWCA, which provides scheduled compensation to land-based maritime workers but which also excepts from its coverage "a master or member of a crew of any vessel." 33 U. S. C. §902(3)(G). This exception is simply "a refinement of the term 'seaman' in the Jones Act." *McDermott Int'l, Inc.* v. *Wilander*, 498 U. S. 337, 347 (1991). Thus, the Jones Act and the LHWCA are complementary regimes that work in tandem: The Jones Act provides tort remedies to *sea*-based maritime workers, while the LHWCA provides workers' compensation to *land*-based maritime employees. *Ibid.*; *Swanson* v. *Marra Brothers, Inc.*, 328 U. S. 1, 6–7 (1946).

Still, discerning the contours of "seaman" status, even with the general maritime law and the LHWCA's language as aids to interpretation, has not been easy. See *Chandris*, *supra*, at 356. We began clarifying the definition of "seaman" in a pair of cases, *McDermott Int'l, Inc.* v. *Wilander*, *supra*, and *Chandris*, *supra*, that addressed the relationship a worker must have to a vessel in order to be a "master or member" of its crew. We now turn to the other half of the LHWCA's equation: how to determine whether a watercraft is a "vessel."

A

Just as Congress did not define the term "seaman" in the Jones Act,[1] it did not define the term "vessel" in the LHWCA

[1] The Shipping Act, 1916, defines the term "vessel" for purposes of the Jones Act. See 46 U. S. C. App. §801. However, the provision of the Jones Act at issue here, §688(a), speaks not of "vessels," but of "seamen." In any event, because we have identified a Jones Act "seaman" with reference to the LHWCA's exclusion, see 33 U. S. C. §902(3)(G) ("a master or member of a crew of any vessel"), it is the LHWCA's use of the term "vessel" that matters. And, as we explain, the context surrounding Con-

itself.[2] However, Congress provided a definition elsewhere. At the time of the LHWCA's enactment, §§1 and 3 of the Revised Statutes of 1873 specified:

> "In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, . . . [t]he word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[3] 18 Stat., pt. 1, p. 1.

Sections 1 and 3 show that, because the LHWCA is an Act of Congress passed after February 25, 1871, the LHWCA's use of the term "vessel" "includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Ibid.*

Section 3's definition, repealed and recodified in 1947 as part of the Rules of Construction Act, 1 U. S. C. §3, has

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gress' enactment of the LHWCA suggests that Rev. Stat. §3, now 1 U. S. C. §3, provides the controlling definition of the term "vessel" in the LHWCA.

[2] As part of its 1972 Amendments to the LHWCA, Congress amended the Act with what appears at first blush to be a definition of the term "vessel": "Unless the context requires otherwise, the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U. S. C. §902(21). However, Congress enacted this definition in conjunction with the third-party vessel owner provision of §905(b). Rather than specifying the characteristics of a vessel, §902(21) instead lists the parties liable for the negligent operation of a vessel. See *McCarthy* v. *The Bark Peking*, 716 F. 2d 130, 133 (CA2 1983) (§902(21) is "circular" and "does not provide precise guidance as to what is included within the term 'vessel'").

[3] Congress had used substantially the same definition before, first in an 1866 antismuggling statute, see §1, 14 Stat. 178, and then in an 1870 statute "provid[ing] for the Relief of sick and disabled Seamen," ch. CLXIX, 16 Stat. 169 (italics deleted); see *id.*, §7, at 170.

remained virtually unchanged from 1873 to the present.[4] Even now, § 3 continues to supply the default definition of "vessel" throughout the U. S. Code, "unless the context indicates otherwise." 1 U. S. C. § 1. The context surrounding the LHWCA's enactment indicates that § 3 defines the term "vessel" for purposes of the LHWCA.

Section 3 merely codified the meaning that the term "vessel" had acquired in general maritime law. See 1 S. Friedell, Benedict on Admiralty § 165 (rev. 7th ed. 2004). In the decades following its enactment, § 3 was regularly used to define the term "vessel" in maritime jurisprudence. Taking only the issue presented here—whether a dredge is a vessel—prior to passage of the Jones Act and the LHWCA, courts often used § 3's definition to conclude that dredges were vessels.[5]

From the very beginning, these courts understood the differences between dredges and more traditional seagoing vessels. Though smaller, the dredges at issue in the earliest cases were essentially the same as the *Super Scoop* here. For instance, the court could have been speaking equally of the *Super Scoop* as of *The Alabama* when it declared:

> "The dredge and scows have no means of propulsion of their own except that the dredge, by the use of anchors, windlass, and rope, is moved for short distances, as required in carrying on the business of dredging. Both

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[4] During the 1947 codification, the hyphen was removed from the word "watercraft." § 3, 61 Stat. 633.

[5] See, *e. g.*, *The Alabama*, 19 F. 544, 546 (SD Ala. 1884) (dredge was a vessel and subject to maritime liens); *Huismann* v. *The Pioneer*, 30 F. 206, 207 (EDNY 1886) (dredge was a vessel under § 3); *Saylor* v. *Taylor*, 77 F. 476, 477 (CA4 1896) (dredge was a vessel under § 3, and its workers were seamen); *The International*, 89 F. 484, 484–485 (CA3 1898) (dredge was a vessel under § 3); *Eastern S. S. Corp.* v. *Great Lakes Dredge & Dock Co.*, 256 F. 497, 500–501 (CA1 1919) (type of dredge called a "drillboat" was a vessel under § 3); *Los Angeles* v. *United Dredging Co.*, 14 F. 2d 364, 365–366 (CA9 1926) (dredge was a vessel under § 3 and its engineers were seamen).

> the dredge and the scows are moved from place to place where they may be employed by being towed, and some of the tows have been for long distances and upon the high seas. The dredge and scows are not made for or adapted to the carriage of freight or passengers, and the evidence does not show that, in point of fact, this dredge and scows had ever been so used and employed." *The Alabama*, 19 F. 544, 545 (SD Ala. 1884).

See also *Huismann* v. *The Pioneer*, 30 F. 206 (EDNY 1886). None of this prevented the court from recognizing that dredges are vessels because they are watercraft with "the capacity to be navigated in and upon the waters." *The Alabama*, *supra*, at 546; see also *The Pioneer*, *supra*, at 207; *The International*, 89 F. 484, 485 (CA3 1898).

This Court also treated dredges as vessels prior to the passage of the Jones Act and the LHWCA. It did so in a pair of cases, first implicitly in *The "Virginia Ehrman" and the "Agnese,"* 97 U. S. 309 (1878), and then explicitly in *Ellis* v. *United States*, 206 U. S. 246 (1907). In *Ellis*, this Court considered, *inter alia*, whether workers aboard various dredges and scows were covered by a federal labor law. Just as in the present case, one of the *Ellis* appellants argued that the dredges at issue were "vessels" within the meaning of Rev. Stat. §3, now 1 U. S. C. §3. 206 U. S., at 249. The United States responded that dredges were only vessels, if at all, when in actual navigation as they were "towed from port to port." *Id.*, at 253. Citing §3, Justice Holmes rejected the Government's argument, stating that "[t]he scows and floating dredges were vessels" that "were within the admiralty jurisdiction of the United States." *Id.*, at 259.

These early cases show that at the time Congress enacted the Jones Act and the LHWCA in the 1920's, it was settled that §3 defined the term "vessel" for purposes of those statutes. It was also settled that a structure's status as a vessel under §3 depended on whether the structure was a means of maritime transportation. See R. Hughes, Handbook of

Admiralty Law § 5, p. 14 (2d ed. 1920). For then, as now, dredges served a waterborne transportation function, since in performing their work they carried machinery, equipment, and crew over water. See, *e. g.*, *Butler* v. *Ellis*, 45 F. 2d 951, 955 (CA4 1930) (finding the vessel status of dredges "sustained by the overwhelming weight of authority"); *The Hurricane*, 2 F. 2d 70, 72 (ED Pa. 1924) (expressing "no doubt" that dredges are vessels), aff'd, 9 F. 2d 396 (CA3 1925).

This Court's cases have continued to treat § 3 as defining the term "vessel" in the LHWCA, and they have continued to construe § 3's definition in light of the term's established meaning in general maritime law. For instance, in *Norton* v. *Warner Co.*, 321 U. S. 565 (1944), the Court considered whether a worker on a harbor barge was "a master or member of a crew of any vessel" under the LHWCA, 33 U. S. C. § 902(3)(G). In finding that the "barge [was] a vessel within the meaning of the Act," the Court not only quoted § 3's definition of the term "vessel," but it also cited in support of its holding several earlier cases that had held dredges to be vessels based on the general maritime law. 321 U. S., at 571, and n. 4. This Court therefore confirmed in *Norton* that § 3 defines the term "vessel" in the LHWCA and that § 3 should be construed consistently with the general maritime law. Since *Norton*, this Court has often said that dredges and comparable watercraft qualify as vessels under the Jones Act and the LHWCA.[6]

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[6] See, *e. g.*, *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 535, and n. 1 (1995) (indicating that a stationary crane barge was a "vessel" under the Extension of Admiralty Jurisdiction Act); *Southwest Marine, Inc.* v. *Gizoni*, 502 U. S. 81, 92 (1991) (holding that a jury could reasonably find that floating platforms were "vessels in navigation" under the Jones Act); *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U. S. 523, 528–530 (1983) (treating coal barge as a "vessel" under the LHWCA, 33 U. S. C. § 905(b)); cf. *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 372 (1957) (assuming that a dredge was a Jones Act vessel); *id.*, at 375, n. 1 (Harlan, J., dissenting) (same).

B

Despite this Court's reliance on § 3 in cases like *Ellis* and *Norton*, Dutra argues that the Court has implicitly narrowed § 3's definition. Section 3 says that a "vessel" must be "used, or capable of being used, as a means of transportation on water." 18 Stat., pt. 1, p. 1. In a pair of cases, the Court held that a drydock, *Cope* v. *Vallette Dry Dock Co.*, 119 U. S. 625, 630 (1887), and a wharfboat attached to the mainland, *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U. S. 19, 22 (1926), were not vessels under § 3, because they were not *practically* capable of being used to transport people, freight, or cargo from place to place. According to Dutra, *Cope* and *Evansville* adopted a definition of "vessel" narrower than § 3's text.

Dutra misreads *Cope* and *Evansville*. In *Cope*, the plaintiff sought a salvage award for having prevented a drydock from sinking after a steamship collided with it. 119 U. S., at 625–626. At the time of the accident, the drydock, a floating dock used for repairing vessels, was "moored and lying at [the] usual place" it had occupied for the past 20 years. *Id.*, at 626. In those circumstances, the drydock was a "fixed structure" that had been "permanently moored," rather than a vessel that had been temporarily anchored. *Id.*, at 627. *Evansville* involved a wharfboat secured by cables to the mainland. Local water, electricity, and telephone lines all ran from shore to the wharfboat, evincing a "permanent location." 271 U. S., at 22. And the wharfboat, like the drydock in *Cope*, was neither "taken from place to place" nor "used to carry freight from one place to another." 271 U. S., at 22. As in *Cope*, the Court concluded that the wharfboat "was not practically capable of being used as a means of transportation." 271 U. S., at 22.

Cope and *Evansville* did no more than construe § 3 in light of the distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore or resting on the

ocean floor. See, *e. g.*, *The Alabama*, 19 F., at 546 (noting that vessels possess "mobility and [the] capacity to navigate," as distinct from fixed structures like wharves, drydocks, and bridges). Simply put, a watercraft is not "capable of being used" for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.

This distinction is sensible: A ship and its crew do not move in and out of Jones Act coverage depending on whether the ship is at anchor, docked for loading or unloading, or berthed for minor repairs, in the same way that ships taken permanently out of the water as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again. See *Pavone* v. *Mississippi Riverboat Amusement Corp.*, 52 F. 3d 560, 570 (CA5 1995) (floating casino was no longer a vessel where it "was moored to the shore in a semi-permanent or indefinite manner"); *Kathriner* v. *Unisea, Inc.*, 975 F. 2d 657, 660 (CA9 1992) (floating processing plant was no longer a vessel where a "large opening [had been] cut into her hull," rendering her incapable of moving over the water). Even if the general maritime law had not informed the meaning of § 3, its definition would not sweep within its reach an array of fixed structures not commonly thought of as capable of being used for water transport. See, *e. g.*, *Leocal* v. *Ashcroft*, *ante*, at 9 ("When interpreting a statute, we must give words their 'ordinary or natural' meaning" (quoting *Smith* v. *United States*, 508 U. S. 223, 228 (1993))).

Applying § 3 brings within the purview of the Jones Act the sorts of watercraft considered vessels at the time Congress passed the Act. By including special-purpose vessels like dredges, § 3 sweeps broadly, but the other prerequisites to qualifying for seaman status under the Jones Act provide some limits, notwithstanding § 3's breadth. A maritime worker seeking Jones Act seaman status must also prove that his duties contributed to the vessel's function or mission,

and that his connection to the vessel was substantial both in nature and duration. *Chandris*, 515 U. S., at 376. Thus, even though the *Super Scoop* is a "vessel," workers injured aboard the *Super Scoop* are eligible for seaman status only if they are "master[s] or member[s]" of its crew.

C

The Court of Appeals, relying on its previous en banc decision in *DiGiovanni* v. *Traylor Brothers, Inc.*, 959 F. 2d 1119 (CA1 1992), held that the *Super Scoop* is not a "vessel" because its primary purpose is not navigation or commerce and because it was not in actual transit at the time of Stewart's injury. 230 F. 3d, at 468–469. Neither prong of the Court of Appeals' test is consistent with the text of § 3 or the established meaning of the term "vessel" in general maritime law.

Section 3 requires only that a watercraft be "used, or capable of being used, as a means of transportation on water" to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose. See *The Alabama*, *supra*, at 546; *The International*, 89 F., at 485. As the Court of Appeals recognized, the *Super Scoop*'s "function was to move through Boston Harbor, . . . digging the ocean bottom as it moved." 343 F. 3d, at 12. In other words, the *Super Scoop* was not only "capable of being used" to transport equipment and workers over water—it *was* used to transport those things. Indeed, it could not have dug the Ted Williams Tunnel had it been unable to traverse the Boston Harbor, carrying with it workers like Stewart.

Also, a watercraft need not be in motion to qualify as a vessel under § 3. Looking to whether a watercraft is motionless or moving is the sort of "snapshot" test that we rejected in *Chandris*. Just as a worker does not "oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured," *Chandris*, 515 U. S., at 363, neither does a watercraft pass in and out of Jones Act coverage

depending on whether it was moving at the time of the accident.

Granted, the Court has sometimes spoken of the requirement that a vessel be "in navigation," *id.*, at 373–374, but never to indicate that a structure's locomotion at any given moment mattered. Rather, the point was that structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time. *Ibid.*; *Roper* v. *United States*, 368 U. S. 20, 21, 23 (1961); *West* v. *United States*, 361 U. S. 118, 122 (1959). The Court did not mean that the "in navigation" requirement stood apart from § 3, such that a "vessel" for purposes of § 3 might nevertheless not be a "vessel in navigation" for purposes of the Jones Act or the LHWCA. See, *e. g.*, *United States* v. *Templeton*, 378 F. 3d 845, 851 (CA8 2004) ("[T]he definition of 'vessel in navigation' under the Jones Act is not as expansive as the general definition of 'vessel' ").

Instead, the "in navigation" requirement is an element of the vessel status of a watercraft. It is relevant to whether the craft is "used, or capable of being used" for maritime transportation. A ship long lodged in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. The question remains in all cases whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one. *Supra*, at 493. In some cases that inquiry may involve factual issues for the jury, *Chandris*, *supra*, at 373, but here no relevant facts were in dispute. Dutra conceded that the *Super Scoop* was only temporarily stationary while Stewart and others were repairing the scow; the *Super Scoop* had not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport.

Finally, although Dutra argues that the *Super Scoop* is not a "vessel" under § 902(3)(G), which is the LHWCA provision that excludes seamen from the Act's coverage, Dutra con-

ceded below that the *Super Scoop is* a "vessel" under § 905(b), which is the LHWCA provision that imposes liability on vessel owners for negligence to longshoremen. The concession was necessary because the Court of Appeals had previously held that § 905(b)'s use of the term "vessel" is "'significantly more inclusive than that used for evaluating seaman status under the Jones Act.'" 343 F. 3d, at 13 (quoting *Morehead* v. *Atkinson-Kiewit*, 97 F. 3d, at 607). The Court of Appeals' approach is no longer tenable. The LHWCA does not meaningfully define the term "vessel" as it appears in either § 902(3)(G) or § 905(b), see n. 2, *supra*, and 1 U. S. C. § 3 defines the term "vessel" throughout the LHWCA.

III

At the time that Congress enacted the LHWCA and since, Rev. Stat. § 3, now 1 U. S. C. § 3, has defined the term "vessel" in the LHWCA. Under § 3, a "vessel" is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment. Because the *Super Scoop* was engaged in maritime transportation at the time of Stewart's injury, it was a vessel within the meaning of 1 U. S. C. § 3. Despite the seeming incongruity of grouping dredges alongside more traditional seafaring vessels under the maritime statutes, Congress and the courts have long done precisely that:

> "[I]t seems a stretch of the imagination to class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far-reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world." *Saylor* v. *Taylor*, 77 F. 476, 479 (CA4 1896).

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

Syllabus

JOHNSON *v.* CALIFORNIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–636. Argued November 2, 2004—Decided February 23, 2005

The California Department of Corrections' (CDC) unwritten policy of racially segregating prisoners in double cells for up to 60 days each time they enter a new correctional facility is based on the asserted rationale that it prevents violence caused by racial gangs. Petitioner Johnson, an African-American inmate who has been intermittently double-celled under the policy's terms ever since his 1987 incarceration, filed this suit alleging that the policy violates his Fourteenth Amendment right to equal protection. The District Court ultimately granted defendant former CDC officials summary judgment on grounds that they were entitled to qualified immunity. The Ninth Circuit affirmed, holding that the policy's constitutionality should be reviewed under the deferential standard articulated in *Turner* v. *Safley*, 482 U. S. 78, not under strict scrutiny, and that the policy survived *Turner* scrutiny.

Held: Strict scrutiny is the proper standard of review for an equal protection challenge to the CDC's policy. Pp. 505–515.

(a) Because the CDC's policy is "immediately suspect" as an express racial classification, *Shaw* v. *Reno*, 509 U. S. 630, 642, the Ninth Circuit erred in failing to apply strict scrutiny and thereby to require the CDC to demonstrate that the policy is narrowly tailored to serve a compelling state interest, see *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227. *"[A]ll* racial classifications [imposed by government] . . . must be analyzed . . . under strict scrutiny," *ibid.*, in order to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant [such] a highly suspect tool," *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493. The CDC's claim that its policy should be exempt from this categorical rule because it is "neutral"—*i. e.*, because all prisoners are "equally" segregated—ignores this Court's repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally," *Shaw*, *supra*, at 651. Indeed, the Court rejected the notion that separate can ever be equal—or "neutral"—50 years ago in *Brown* v. *Board of Education*, 347 U. S. 483, and refuses to resurrect it today. The Court has previously applied a heightened standard of review in evaluating racial segregation in prisons. *Lee* v. *Washington*, 390 U. S. 333. The need for strict scrutiny is no less important here. By perpetuating

the notion that race matters most, racial segregation of inmates "may exacerbate the very patterns of [violence that it is] said to counteract." *Shaw*, *supra*, at 648. Virtually all other States and the Federal Government manage their prison systems without reliance on racial segregation. In fact, the United States argues that it is possible to address prison security concerns through individualized consideration without using racial segregation, unless it is warranted as a necessary and temporary response to a serious threat of race-related violence. As to transferees, in particular, whom the CDC has already evaluated at least once, it is not clear why more individualized determinations are not possible. Pp. 505–509.

(b) The Court declines the CDC's invitation to make an exception to the categorical strict scrutiny rule and instead to apply *Turner*'s deferential review standard on the ground that the CDC's policy applies only in the prison context. The Court has never applied the *Turner* standard—which asks whether a regulation that burdens prisoners' fundamental rights is "reasonably related" to "legitimate penological interests," 482 U. S., at 89—to racial classifications. *Turner* itself did not involve such a classification, and it cast no doubt on *Lee*. That is unsurprising, as the Court has applied the *Turner* test *only* to rights that are "inconsistent with proper incarceration." *Overton* v. *Bazzetta*, 539 U. S. 126, 131. The right not to be discriminated against based on one's race is not susceptible to *Turner*'s logic because it is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Cf. *Batson* v. *Kentucky*, 476 U. S. 79, 99. Deference to the particular expertise of officials managing daily prison operations does not require a more relaxed standard here. The Court did not relax the standard of review for racial classifications in prison in *Lee*, and it refuses to do so today. Rather, it explicitly reaffirms that the "necessities of prison security and discipline," *Lee*, *supra*, at 334, are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities, see, *e. g.*, *Grutter* v. *Bollinger*, 539 U. S. 306, 353. Because *Turner*'s standard would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy does not in practice advance that goal, it is too lenient a standard to ferret out invidious uses of race. Contrary to the CDC's protest, strict scrutiny will not render prison administrators unable to address legitimate problems of race-based violence in prisons. On remand, the CDC will have the burden of demonstrating that its policy is

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narrowly tailored with regard to new inmates as well as transferees. Pp. 509–515.

(c) The Court does not decide whether the CDC's policy violates equal protection, but leaves it to the Ninth Circuit, or the District Court, to apply strict scrutiny in the first instance. See, *e. g.*, *Consolidated Rail Corporation* v. *Gottshall*, 512 U. S. 532, 557–558. P. 515.

321 F. 3d 791, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 516. STEVENS, J., filed a dissenting opinion, *post*, p. 517. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 524. REHNQUIST, C. J., took no part in the decision of the case.

Bert H. Deixler argued the cause for petitioner. With him on the briefs were *Charles S. Sims*, *Lois D. Thompson*, and *Tanya L. Forsheit*.

Acting Solicitor General Clement argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Solicitor General Olson*, *Assistant Attorney General Acosta*, *David B. Salmons*, *David K. Flynn*, and *Tovah R. Calderon*.

Frances T. Grunder, Senior Assistant Attorney General of California, argued the cause for respondents. With her on the brief were *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, and *Sara Turner*, Supervising Deputy Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Elizabeth Alexander*, *David C. Fathi*, *Steven R. Shapiro*, *Jordan C. Budd*, *Alan Schlosser*, and *Mark D. Rosenbaum*; and for Former State Corrections Officials by *Michael C. Small*.

Briefs of *amici curiae* urging affirmance were filed for the State of Utah et al. by *Mark L. Shurtleff*, Attorney General of Utah, and *Gene C. Schaerr*, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Gregg D. Renkes* of Alaska, *M. Jane Brady* of Delaware, *Lawrence G. Wasden* of Idaho, *Brian Sandoval* of Nevada, *Kelly A. Ayotte* of New Hampshire, and *Wayne Stenehjem* of North Da-

JUSTICE O'CONNOR delivered the opinion of the Court.

The California Department of Corrections (CDC) has an unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they enter a new correctional facility. We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy.

I

A

CDC institutions house all new male inmates and all male inmates transferred from other state facilities in reception centers for up to 60 days upon their arrival. During that time, prison officials evaluate the inmates to determine their ultimate placement. Double-cell assignments in the reception centers are based on a number of factors, predominantly race. In fact, the CDC has admitted that the chances of an inmate being assigned a cellmate of another race are "'[p]retty close'" to zero percent. App. to Pet. for Cert. 3a. The CDC further subdivides prisoners within each racial group. Thus, Japanese-Americans are housed separately from Chinese-Americans, and northern California Hispanics are separated from southern California Hispanics.

The CDC's asserted rationale for this practice is that it is necessary to prevent violence caused by racial gangs. Brief for Respondents 1–6. It cites numerous incidents of racial violence in CDC facilities and identifies five major prison gangs in the State: Mexican Mafia, Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders. *Id.*, at 2. The CDC also notes that prison-gang culture is violent and murderous. *Id.*, at 3. An associate warden tes-

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kota; and for the National Association of Black Law Enforcement Officers, Inc., by *David T. Goldberg.*

John H. Findley filed a brief for the Pacific Legal Foundation as *amicus curiae.*

tified that if race were not considered in making initial housing assignments, she is certain there would be racial conflict in the cells and in the yard. App. 215a. Other prison officials also expressed their belief that violence and conflict would result if prisoners were not segregated. See, *e. g.*, *id.*, at 305a–306a. The CDC claims that it must therefore segregate all inmates while it determines whether they pose a danger to others. See Brief for Respondents 29.

With the exception of the double cells in reception areas, the rest of the state prison facilities—dining areas, yards, and cells—are fully integrated. After the initial 60-day period, prisoners are allowed to choose their own cellmates. The CDC usually grants inmate requests to be housed together, unless there are security reasons for denying them.

B

Garrison Johnson is an African-American inmate in the custody of the CDC. He has been incarcerated since 1987 and, during that time, has been housed at a number of California prison facilities. Fourth Amended Complaint 3, Record, Doc. No. 78. Upon his arrival at Folsom prison in 1987, and each time he was transferred to a new facility thereafter, Johnson was double-celled with another African-American inmate. See *ibid.*

Johnson filed a complaint *pro se* in the United States District Court for the Central District of California on February 24, 1995, alleging that the CDC's reception-center housing policy violated his right to equal protection under the Fourteenth Amendment by assigning him cellmates on the basis of his race. He alleged that, from 1987 to 1991, former CDC Director James Rowland instituted and enforced an unconstitutional policy of housing inmates according to race. Second Amended Complaint 2–4, Record, Doc. No. 21. Johnson made the same allegations against former Director James Gomez for the period from 1991 until the filing of his complaint. *Ibid.* The District Court dismissed his complaint

for failure to state a claim. The Court of Appeals for the Ninth Circuit reversed and remanded, holding that Johnson had stated a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *Johnson* v. *California*, 207 F. 3d 650, 655 (2000).

On remand, Johnson was appointed counsel and granted leave to amend his complaint. On July 5, 2000, he filed his Fourth Amended Complaint. Record, Doc. No. 81. Johnson claimed that the CDC's policy of racially segregating all inmates in reception-center cells violated his rights under the Equal Protection Clause. Johnson sought damages, alleging that former CDC Directors Rowland and Gomez, in their individual capacities, violated his constitutional rights by formulating and implementing the CDC's housing policy. He also sought injunctive relief against former CDC Director Stephen Cambra.

Johnson has consistently challenged, and the CDC has consistently defended, the policy as a whole—as it relates to both new inmates and inmates transferred from other facilities. Johnson was first segregated in 1987 as a new inmate when he entered the CDC facility at Folsom. Since 1987, he has been segregated each time he has been transferred to a new facility. Thus, he has been subject to the CDC's policy both as a new inmate and as an inmate transferred from one facility to another.

After discovery, the parties moved for summary judgment. The District Court granted summary judgment to the defendants on grounds that they were entitled to qualified immunity because their conduct was not clearly unconstitutional. The Court of Appeals for the Ninth Circuit affirmed. 321 F. 3d 791 (2003). It held that the constitutionality of the CDC's policy should be reviewed under the deferential standard we articulated in *Turner* v. *Safley*, 482 U. S. 78 (1987)—not strict scrutiny. 321 F. 3d, at 798–799. Applying *Turner*, it held that Johnson had the burden of refuting the "common-sense connection" between the policy and

prison violence. 321 F. 3d, at 802. Though it believed this was a "close case," *id.*, at 798, the Court of Appeals concluded that the policy survived *Turner*'s deferential standard, 321 F. 3d, at 807.

The Court of Appeals denied Johnson's petition for rehearing en banc. Judge Ferguson, joined by three others, dissented on grounds that "[t]he panel's decision ignore[d] the Supreme Court's repeated and unequivocal command that all racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny, and fail[ed] to recognize that [the] *Turner* analysis is inapplicable in cases, such as this one, in which the right asserted is not inconsistent with legitimate penological objectives." 336 F. 3d 1117 (2003) (internal quotation marks and citations omitted). We granted certiorari to decide which standard of review applies. 540 U. S. 1217 (2004).

II

A

We have held that "*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995) (emphasis added). Under strict scrutiny, the government has the burden of proving that racial classifications "are narrowly tailored measures that further compelling governmental interests." *Ibid.* We have insisted on strict scrutiny in every context, even for so-called "benign" racial classifications, such as race-conscious university admissions policies, see *Grutter* v. *Bollinger*, 539 U. S. 306, 326 (2003), race-based preferences in government contracts, see *Adarand*, *supra*, at 226, and race-based districting intended to improve minority representation, see *Shaw* v. *Reno*, 509 U. S. 630, 650 (1993).

The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and

again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493 (1989) (plurality opinion). We therefore apply strict scrutiny to *all* racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Ibid.*[1]

The CDC claims that its policy should be exempt from our categorical rule because it is "neutral"—that is, it "neither benefits nor burdens one group or individual more than any other group or individual." Brief for Respondents 16. In other words, strict scrutiny should not apply because all prisoners are "equally" segregated. The CDC's argument ignores our repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Shaw*, *supra*, at 651. Indeed, we rejected the notion that separate can ever be equal—or "neutral"—50 years ago in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and we refuse to resurrect it today. See also *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991) (rejecting the argument that race-based peremptory challenges were permissible because they applied equally to white and black jurors and holding that "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree").

We have previously applied a heightened standard of review in evaluating racial segregation in prisons. In *Lee* v.

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[1] JUSTICE THOMAS takes a hands-off approach to racial classifications in prisons, suggesting that a "compelling showing [is] needed to overcome the deference we owe to prison administrators." *Post*, at 543 (dissenting opinion). But such deference is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.

Washington, 390 U. S. 333 (1968) *(per curiam)*, we upheld a three-judge court's decision striking down Alabama's policy of segregation in its prisons. *Id.*, at 333–334. Alabama had argued that desegregation would undermine prison security and discipline, *id.*, at 334, but we rejected that contention. Three Justices concurred "to make explicit something that is left to be gathered only by implication from the Court's opinion"—"that prison authorities have the right, acting in good faith and in *particularized circumstances*, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Ibid.* (emphasis added). The concurring Justices emphasized that they were "unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Ibid.*

The need for strict scrutiny is no less important here, where prison officials cite racial violence as the reason for their policy. As we have recognized in the past, racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to *incite racial hostility*." *Shaw*, *supra*, at 643 (citing *J. A. Croson Co.*, *supra*, at 493 (plurality opinion); emphasis added). Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates "may exacerbate the very patterns of [violence that it is] said to counteract." *Shaw*, *supra*, at 648; see also Trulson & Marquart, The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons, 36 Law & Soc. Rev. 743, 774 (2002) (in a study of prison desegregation, finding that "over [10 years] the rate of violence between inmates segregated by race in double cells surpassed the rate among those

racially integrated"). See also Brief for Former State Corrections Officials as *Amici Curiae* 19 (opinion of former corrections officials from six States that "racial integration of cells tends to diffuse racial tensions and thus diminish interracial violence" and that "a blanket policy of racial segregation of inmates is contrary to sound prison management").

The CDC's policy is unwritten. Although California claimed at oral argument that two other States follow a similar policy, see Tr. of Oral Arg. 30–31, this assertion was unsubstantiated, and we are unable to confirm or deny its accuracy.[2] Virtually all other States and the Federal Government manage their prison systems without reliance on racial segregation. See Brief for United States as *Amicus Curiae* 24. Federal regulations governing the Federal Bureau of Prisons (BOP) expressly prohibit racial segregation. 28 CFR § 551.90 (2004) ("[BOP] staff shall not discrim-

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[2] Though, as JUSTICE THOMAS points out, see *post*, at 544–545, and n. 12, inmates in reception centers in Oklahoma and Texas "'are not generally assigned randomly to racially integrated cells,'" it is also the case that "these inmates are not precluded from integrated cell assignments," Oklahoma Dept. of Corrections, Policies and Procedures, Operations Memorandum No. OP–030102, Inmate Housing (Sept. 16, 2004), available at http://www.doc.state.ok.us/docs/policies.htm (as visited Jan. 21, 2005, and available in Clerk of Court's case file); Texas Dept. of Criminal Justice, Security Memorandum No. SM–01.28, Assignment to General Population Two-Person Cells (June 15, 2002). See also Brief for Former State Corrections Officials as *Amici Curiae* 20, n. 10 ("To the extent that race is considered in the assignment calculus in Oklahoma, it appears to be one factor among many, and as a result, individualized consideration is given to all inmates"). We therefore have no way of knowing whether, in practice, inmates in Oklahoma and Texas, like those in California, have close to no chance, App. to Pet. for Cert. 3a, of being celled with a person of a different race. See also Brief for Former State Corrections Officials as *Amici Curiae* 19–20 ("[W]e are aware of no state other than California that assumes that every incoming prisoner is incapable of getting along with a cell mate of a different race. And we are aware of no state other than California that has acted on such an assumption by adopting an inflexible and absolute policy of racial segregation of double cells in reception centers").

inate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs"). The United States contends that racial integration actually "leads to less violence in BOP's institutions and better prepares inmates for re-entry into society." Brief for United States as *Amicus Curiae* 25. Indeed, the United States argues, based on its experience with the BOP, that it is possible to address "concerns of prison security through individualized consideration without the use of racial segregation, unless warranted as a necessary and temporary response to a race riot or other serious threat of race-related violence." *Id.*, at 24. As to transferees, in particular, whom the CDC has already evaluated at least once, it is not clear why more individualized determinations are not possible.

Because the CDC's policy is an express racial classification, it is "immediately suspect." *Shaw*, 509 U. S., at 642; see also *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457, 485 (1982). We therefore hold that the Court of Appeals erred when it failed to apply strict scrutiny to the CDC's policy and to require the CDC to demonstrate that its policy is narrowly tailored to serve a compelling state interest.

B

The CDC invites us to make an exception to the rule that strict scrutiny applies to all racial classifications, and instead to apply the deferential standard of review articulated in *Turner* v. *Safley*, 482 U. S. 78 (1987), because its segregation policy applies only in the prison context. We decline the invitation. In *Turner*, we considered a claim by Missouri prisoners that regulations restricting inmate marriages and inmate-to-inmate correspondence were unconstitutional. *Id.*, at 81. We rejected the prisoners' argument that the regulations should be subject to strict scrutiny, asking instead whether the regulation that burdened the prisoners'

fundamental rights was "reasonably related" to "legitimate penological interests." *Id.*, at 89.

We have never applied *Turner* to racial classifications. *Turner* itself did not involve any racial classification, and it cast no doubt on *Lee*. We think this unsurprising, as we have applied *Turner*'s reasonable-relationship test *only* to rights that are "inconsistent with proper incarceration." *Overton* v. *Bazzetta*, 539 U. S. 126, 131 (2003); see also *Pell* v. *Procunier*, 417 U. S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"). This is because certain privileges and rights must necessarily be limited in the prison context. See *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 348 (1987) ("'[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system'" (quoting *Price* v. *Johnston*, 334 U. S. 266, 285 (1948))). Thus, for example, we have relied on *Turner* in addressing First Amendment challenges to prison regulations, including restrictions on freedom of association, *Overton*, *supra;* limits on inmate correspondence, *Shaw* v. *Murphy*, 532 U. S. 223 (2001); restrictions on inmates' access to courts, *Lewis* v. *Casey*, 518 U. S. 343 (1996); restrictions on receipt of subscription publications, *Thornburgh* v. *Abbott*, 490 U. S. 401 (1989); and work rules limiting prisoners' attendance at religious services, *Shabazz*, *supra*. We have also applied *Turner* to some due process claims, such as involuntary medication of mentally ill prisoners, *Washington* v. *Harper*, 494 U. S. 210 (1990); and restrictions on the right to marry, *Turner*, *supra*.

The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimina-

tion is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Race discrimination is "especially pernicious in the administration of justice." *Rose* v. *Mitchell*, 443 U. S. 545, 555 (1979). And public respect for our system of justice is undermined when the system discriminates based on race. Cf. *Batson* v. *Kentucky*, 476 U. S. 79, 99 (1986) ("[P]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race"). When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers. For similar reasons, we have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the "deliberate indifference" standard, rather than *Turner*'s "reasonably related" standard. See *Hope* v. *Pelzer*, 536 U. S. 730, 738 (2002) (asking whether prison officials displayed " 'deliberate indifference' to the inmates' health or safety" where an inmate claimed that they violated his rights under the Eighth Amendment (quoting *Hudson* v. *McMillian*, 503 U. S. 1, 8 (1992))). This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment. See *Spain* v. *Procunier*, 600 F. 2d 189, 193–194 (CA9 1979) (Kennedy, J.) ("[T]he full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons convicted of crimes. . . . Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary").

In the prison context, when the government's power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious dis-

crimination. Granting the CDC an exemption from the rule that strict scrutiny applies to all racial classifications would undermine our "unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey* v. *Kemp*, 481 U. S. 279, 309 (1987) (internal quotation marks omitted).

The CDC argues that "[d]eference to the particular expertise of prison officials in the difficult task of managing daily prison operations" requires a more relaxed standard of review for its segregation policy. Brief for Respondents 18. But we have refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion. For example, we have held that, despite the broad discretion given to prosecutors when they use their peremptory challenges, using those challenges to strike jurors on the basis of their race is impermissible. See *Batson*, *supra*, at 89–96. Similarly, in the redistricting context, despite the traditional deference given to States when they design their electoral districts, we have subjected redistricting plans to strict scrutiny when States draw district lines based predominantly on race. Compare generally *Vieth* v. *Jubelirer*, 541 U. S. 267 (2004) (partisan gerrymandering), with *Shaw* v. *Reno*, 509 U. S. 630 (1993) (racial gerrymandering).

We did not relax the standard of review for racial classifications in prison in *Lee*, and we refuse to do so today. Rather, we explicitly reaffirm what we implicitly held in *Lee:* The "necessities of prison security and discipline," 390 U. S., at 334, are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities. See *Grutter*, 539 U. S., at 353 (THOMAS, J., concurring in part and dissenting in part) (citing *Lee* for the principle that "protecting prisoners from violence might justify narrowly tailored racial discrimination"); *J. A. Croson Co.*, 488 U. S., at 521 (SCALIA, J., concurring in judgment) (citing *Lee* for the proposition that "only a social emergency rising to the level of imminent danger to life and limb—for

example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens'" (quoting *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting))); see also *Pell*, 417 U. S., at 823 ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves").

JUSTICE THOMAS would subject race-based policies in prisons to *Turner*'s deferential standard of review because, in his view, judgments about whether race-based policies are necessary "are better left in the first instance to the officials who run our Nation's prisons." *Post*, at 542. But *Turner* is too lenient a standard to ferret out invidious uses of race. *Turner* requires only that the policy be "reasonably related" to "legitimate penological interests." 482 U. S., at 89. *Turner* would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy does not in practice advance that goal. See, *e. g.*, 321 F. 3d, at 803 (case below) (reasoning that, under *Turner*, the Court of Appeals did "not have to agree that the policy actually advances the CDC's legitimate interest, but only [that] 'defendants might reasonably have thought that the policy would advance its interests'"). See also *Turner*, *supra*, at 90 (warning that *Turner* is not a "least restrictive alternative test" (internal quotation marks omitted)).

For example, in JUSTICE THOMAS' world, prison officials could segregate visiting areas on the ground that racial mixing would cause unrest in the racially charged prison atmosphere. Under *Turner*, "[t]he prisoner would have to prove that there would *not* be a riot[.] [But] [i]t is certainly 'plausible' that such a riot could ensue: our society, as well as our prisons, contains enough racists that almost any interracial interaction could potentially lead to conflict." 336 F. 3d, at

1120 (case below) (Ferguson, J., dissenting from denial of rehearing en banc). Indeed, under JUSTICE THOMAS' view, there is no obvious limit to permissible segregation in prisons. It is not readily apparent why, if segregation in reception centers is justified, segregation in the dining halls, yards, and general housing areas is not also permissible. Any of these areas could be the potential site of racial violence. If JUSTICE THOMAS' approach were to carry the day, even the blanket segregation policy struck down in *Lee* might stand a chance of survival if prison officials simply asserted that it was necessary to prison management. We therefore reject the *Turner* standard for racial classifications in prisons because it would make rank discrimination too easy to defend.

The CDC protests that strict scrutiny will handcuff prison administrators and render them unable to address legitimate problems of race-based violence in prisons. See also *post*, at 531–532, 546–547 (THOMAS, J., dissenting). Not so. Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand*, 515 U. S., at 237 (internal quotation marks omitted); *Grutter*, 539 U. S., at 326–327 ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it"). Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety. Prison administrators, however, will have to demonstrate that any race-based policies are narrowly tailored to that end. See *id.*, at 327 ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied").[3]

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[3] JUSTICE THOMAS characterizes the CDC's policy as a "limited" one, see *post*, at 525, but the CDC's policy is in fact sweeping in its application. It applies to *all* prisoners housed in double cells in reception centers, whether newly admitted or transferred from one facility to another. Moreover, despite JUSTICE THOMAS' suggestion that the CDC considers other nonracial factors in determining housing placements, the CDC itself

The fact that strict scrutiny applies "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Adarand*, *supra*, at 229–230. At this juncture, no such determination has been made. On remand, the CDC will have the burden of demonstrating that its policy is narrowly tailored with regard to new inmates as well as transferees. Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into account.

III

We do not decide whether the CDC's policy violates the Equal Protection Clause. We hold only that strict scrutiny is the proper standard of review and remand the case to allow the Court of Appeals for the Ninth Circuit, or the District Court, to apply it in the first instance. See *Consolidated Rail Corporation* v. *Gottshall*, 512 U. S. 532, 557–558 (1994) (reversing and remanding for the lower court to apply the correct legal standard in the first instance); *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1031–1032 (1992) (same). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

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has admitted that, in practice, there is a "'[p]retty close'" to zero percent chance that an inmate will be housed with a person of a different race. App. to Pet. for Cert. 3a. See also generally *post*, at 517–518, and n. 1 (STEVENS, J., dissenting). Thus, despite an inmate's "age, physical size, mental health, medical needs, [and] criminal history," *post*, at 536 (THOMAS, J., dissenting), the fact that he is black categorically precludes him from being celled with a white inmate. As we explain, see *infra* this page, we do not decide whether the threat of violence in California prisons is sufficient to justify such a broad policy.

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

I join the Court's opinion, subject to the reservation expressed in *Grutter* v. *Bollinger*, 539 U. S. 306, 344–346 (2003) (GINSBURG, J., concurring).

The Court today resoundingly reaffirms the principle that state-imposed racial segregation is highly suspect and cannot be justified on the ground that "'all persons suffer [the separation] in equal degree.'" *Ante*, at 506 (quoting *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991)). While I join that declaration without reservation, I write separately to express again my conviction that the same standard of review ought not control judicial inspection of every official race classification. As I stated most recently in *Gratz* v. *Bollinger*, 539 U. S. 244, 301 (2003) (dissenting opinion): "Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated." See also *Grutter*, 539 U. S., at 344–346 (GINSBURG, J., concurring); *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 271–276 (1995) (GINSBURG, J., dissenting).

There is no pretense here, however, that the California Department of Corrections (CDC) installed its segregation policy to "correct inequalities." See Wechsler, The Nationalization of Civil Liberties and Civil Rights, Supp. to 12 Tex. Q. 10, 23 (1968). Experience in other States and in federal prisons, see *ante*, at 508–509; *post*, at 519–520 (STEVENS, J., dissenting), strongly suggests that CDC's race-based assignment of new inmates and transferees, administratively convenient as it may be, is not necessary to the safe management of a penal institution.

Disagreeing with the Court that "strict scrutiny" properly applies to any and all racial classifications, see *ante*, at 505–509, 511–513, 514, but agreeing that the stereotypical classification at hand warrants rigorous scrutiny, I join the Court's opinion.

JUSTICE STEVENS, dissenting.

In my judgment a state policy of segregating prisoners by race during the first 60 days of their incarceration, as well as the first 60 days after their transfer from one facility to another, violates the Equal Protection Clause of the Fourteenth Amendment. The California Department of Corrections (CDC) has had an ample opportunity to justify its policy during the course of this litigation, but has utterly failed to do so whether judged under strict scrutiny or the more deferential standard set out in *Turner* v. *Safley*, 482 U. S. 78 (1987). The CDC had no incentive in the proceedings below to withhold evidence supporting its policy; nor has the CDC made any offer of proof to suggest that a remand for further factual development would serve any purpose other than to postpone the inevitable. I therefore agree with the submission of the United States as *amicus curiae* that the Court should hold the policy unconstitutional on the current record.

The CDC's segregation policy[1] is based on a conclusive presumption that housing inmates of different races together creates an unacceptable risk of racial violence. Under the policy's logic, an inmate's race is a proxy for gang membership, and gang membership is a proxy for violence. The

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[1] The CDC operates 32 prisons, 7 of which house reception centers. All new inmates and all inmates transferring between prisons are funneled through one of these reception centers before they are permanently placed. At the centers, inmates are housed either in dormitories, double cells, or single cells (of which there are few). Under the CDC's segregation policy, race is a determinative factor in placing inmates in double cells, regardless of the other factors considered in such decisions. While a corrections official with 24 years of experience testified that an exception to this policy was once granted to a Hispanic inmate who had been "raised with Crips," App. 184a, the CDC's suggestion that its policy is therefore flexible, see Brief for Respondents 9, strains credulity. There is no evidence that the CDC routinely allows inmates to opt out of segregation, much less evidence that the CDC informs inmates of their supposed right to do so.

CDC, however, has offered scant empirical evidence or expert opinion to justify this use of race under even a minimal level of constitutional scrutiny. The presumption underlying the policy is undoubtedly overbroad. The CDC has made no effort to prove what fraction of new or transferred inmates are members of race-based gangs, nor has it shown more generally that interracial violence is disproportionately greater than intraracial violence in its prisons. Proclivity toward racial violence unquestionably varies from inmate to inmate, yet the CDC applies its blunderbuss policy to *all* new and transferred inmates housed in double cells regardless of their criminal histories or records of previous incarceration. Under the CDC's policy, for example, two car thieves of different races—neither of whom has any history of gang involvement, or of violence, for that matter—would be barred from being housed together during their first two months of prison. This result derives from the CDC's inflexible judgment that such integrated living conditions are simply too dangerous. This Court has never countenanced such racial prophylaxis.

To establish a link between integrated cells and violence, the CDC relies on the views of two state corrections officials. They attested to their belief that double-celling members of different races would lead to violence and that this violence would spill out into the prison yards. One of these officials, an associate warden, testified as follows:

> "[W]ith the Asian population, the control sergeants have to be more careful than they do with Blacks, Whites, and Hispanics because, for example, you cannot house a Japanese inmate with a Chinese inmate. You cannot. They will kill each other. They won't even tell you about it. They will just do it. The same with Laotians, Vietnamese, Cambodians, Filipinos. You have to be very careful about housing other Asians with other Asians. It's very culturally heavy." App. 189a.

Such musings inspire little confidence. Indeed, this comment supports the suspicion that the policy is based on racial stereotypes and outmoded fears about the dangers of racial integration. This Court should give no credence to such cynical, reflexive conclusions about race. See, *e. g.*, *Palmore* v. *Sidoti*, 466 U. S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category"); *Watson* v. *Memphis*, 373 U. S. 526, 536 (1963) (rejecting the city's plea for delay in desegregating public facilities when "neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials").

The very real risk that prejudice (whether conscious or not) partly underlies the CDC's policy counsels in favor of relaxing the usual deference we pay to corrections officials in these matters. We should instead insist on hard evidence, especially given that California's policy is an outlier when compared to nationwide practice. The Federal Bureau of Prisons administers 104 institutions; no similar policy is applied in any of them. Countless state penal institutions are operated without such a policy. An *amici* brief filed by six former state corrections officials with an aggregate of over 120 years of experience managing prison systems in Wisconsin, Georgia, Oklahoma, Kansas, Alaska, and Washington makes clear that a blanket policy of even temporary segregation runs counter to the great weight of professional opinion on sound prison management. See Brief for Former State Corrections Officials as *Amici Curiae* 19. Tellingly, the CDC can only point to two other States, Texas and Oklahoma, that use racial status in assigning inmates in prison reception areas. It is doubtful from the record that these States' policies have the same broad and inflexible sweep as California's, and this is ultimately beside the point. What is important is that the Federal Government and the vast

majority of States address the threat of interracial violence in prisons without resorting to the expedient of segregation.

In support of its policy, the CDC offers poignant evidence that its prisons are infested with violent race-based gangs. The most striking of this evidence involves a series of riots that took place between 1998 and 2001 at Pelican Bay State Prison. That prison houses some of the State's most violent criminal offenders, including "validated" gang members who have been transferred from other prisons. The riots involved both interracial and intraracial violence. In the most serious incident, involving 250–300 inmates, "Southern Hispanic" gang members, joined by some white inmates, attacked a number of black inmates.

Our judicial role, however, requires that we scratch below the surface of this evidence, lest the sheer gravity of a threat be allowed to authorize any policy justified in its name. Upon inspection, the CDC's *post hoc*, generalized evidence of gang violence is only tenuously related to its segregation policy. Significantly, the CDC has not cited a single specific incident of interracial violence between cellmates—much less a *pattern* of such violence—that prompted the adoption of its unique policy years ago. Nor is there any indication that antagonism between cellmates played any role in the more recent riots the CDC mentions. And despite the CDC's focus on prison gangs and its suggestion that such gangs will recruit new inmates into committing racial violence during their 60-day stays in the reception centers, the CDC has cited no evidence of such recruitment, nor has it identified any instances in which new inmates committed racial violence against other new inmates in the common areas, such as the yard or the cafeteria. Perhaps the CDC's evidence might provide a basis for arguing that at Pelican Bay and other facilities that have experienced similar riots, some race-conscious measures are justified if properly tailored. See *Lee* v. *Washington*, 390 U. S. 333, 334 (1968) (Black, J., concurring). But even if the incidents cited by the CDC,

which occurred in the general prison population, were relevant to the conditions in the reception centers, they provide no support for the CDC's decision to apply its segregation policy to *all* of its reception centers, without regard for each center's security level or history of racial violence. Nor do the incidents provide any support for a policy applicable only to cellmates, while the common areas of the prison in which the disturbances occurred remain fully integrated.

Given the inherent indignity of segregation and its shameful historical connotations, one might assume that the CDC came to its policy only as a last resort. Distressingly, this is not so: There is no evidence that the CDC has ever experimented with, or even carefully considered, race-neutral methods of achieving its goals. That the policy is unwritten reflects, I think, the evident lack of deliberation that preceded its creation.

Specifically, the CDC has failed to explain why it could not, as an alternative to automatic segregation, rely on an individualized assessment of each inmate's risk of violence when assigning him to a cell in a reception center. The Federal Bureau of Prisons and other state systems do so without any apparent difficulty. For inmates who are being transferred from one facility to another—who represent approximately 85% of those subject to the segregation policy—the CDC can simply examine their prison records to determine if they have any known gang affiliations or if they have ever engaged in or threatened racial violence. For example, the CDC has had an opportunity to observe petitioner for almost 20 years; surely the CDC could have determined his placement without subjecting him to a period of segregation.[2] For new inmates, assignments can be based on their

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[2] In explaining why it cannot prescreen new inmates, the CDC's brief all but concedes that segregating transferred inmates is unnecessary. See Brief for Respondents 42 ("If the officials had all of the necessary information to assess the inmates' violence potential when the inmates arrived, perhaps a different practice could be used. But unlike the federal system,

presentence reports, which contain information about offense conduct, criminal record, and personal history—including any available information about gang affiliations. In fact, state law requires the county probation officer to transmit a presentence report to the CDC along with an inmate's commitment papers. See Cal. Penal Code Ann. § 1203c (West 2004); Cal. Rule of Court 4.411(d) (Criminal Cases) (West Supp. 2004).

Despite the rich information available in these records, the CDC considers these records only rarely in assigning inmates to cells in the reception centers. The CDC's primary explanation for this is administrative inefficiency—the records, it says, simply do not arrive in time. The CDC's counsel conceded at oral argument that presentence reports "have a fair amount of information," but she stated that, "in California, the presentence report does not always accompany the inmate and frequently does not. It follows some period of time later from the county." Tr. of Oral Arg. 33. Despite the state-law requirement to the contrary, counsel informed the Court that the counties are not preparing the presentence reports "in a timely fashion." *Ibid.* Similarly, with regard to transferees, counsel stated that their prison records do not arrive at the reception centers in time to make cell assignments. *Id.*, at 28. Even if such inefficiencies might explain a temporary expedient in some cases, they surely do not justify a systemwide policy. When the State's interest in administrative convenience is pitted against the Fourteenth Amendment's ban on racial segregation, the latter must prevail. When there has been no "serious, good faith consideration of workable race-neutral alternatives that will achieve the [desired goal]," *Grutter* v. *Bollinger*, 539

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where the inmates generally are in federal custody from the moment they are arrested, state inmates are in county custody until they are convicted and later transferred to the custody of the CDC").

U. S. 306, 339 (2003), and when "obvious, easy alternatives" are available, *Turner*, 482 U. S., at 90, the conclusion that CDC's policy is unconstitutional is inescapable regardless of the standard of review that the Court chooses to apply.[3]

In fact, the CDC's failure to demand timely presentence reports and prison records undercuts the sincerity of its concern for inmate security during the reception process. Race is an unreliable and necessarily underinclusive predictor of violence. Without the inmate-specific information found in the records, there is a risk that corrections officials will, for example, house together inmates of the same race who are nevertheless members of rival gangs, such as the Bloods and Crips.[4]

Accordingly, while I agree that a remand is appropriate for a resolution of the issue of qualified immunity, I respectfully dissent from the Court's refusal to decide, on the basis of the record before us, that the CDC's policy is unconstitutional.

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[3] Because the *Turner* factors boil down to a tailoring test, and I conclude that the CDC's policy is, at best, an "'exaggerated response'" to its asserted security concerns, see *Turner* v. *Safley*, 482 U. S. 78, 90 (1987), I find it unnecessary to address specifically the other factors, such as whether new and transferred inmates have "alternative means" of exercising their right to equal protection during their period of housing segregation, *id.*, at 89. Indeed, this case demonstrates once again that "[h]ow a court describes its standard of review when a prison regulation infringes fundamental constitutional rights often has far less consequence[s] for the inmates than the actual showing that the court demands of the State in order to uphold the regulation." *Id.*, at 100 (STEVENS, J., concurring in part and dissenting in part).

[4] The CDC's policy may be counterproductive in other ways. For example, an official policy of segregation may initiate new arrivals into a corrosive culture of prison racial segregation, lending credence to the view that members of other races are to be feared and that racial alliances are necessary. While integrated cells encourage inmates to gain valuable cross-racial experiences, segregated cells may well facilitate the formation of race-based gangs. See Brief for Former State Corrections Officials as *Amici Curiae* 19 (citing evidence and experience suggesting that the racial integration of cells on balance decreases interracial violence).

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The questions presented in this case require us to resolve two conflicting lines of precedent. On the one hand, as the Court stresses, this Court has said that "'*all* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.'" *Gratz* v. *Bollinger*, 539 U. S. 244, 270 (2003) (quoting *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 224 (1995); emphasis added). On the other, this Court has no less categorically said that "the [relaxed] standard of review we adopted in *Turner* [v. *Safley*, 482 U. S. 78 (1987),] applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." *Washington* v. *Harper*, 494 U. S. 210, 224 (1990) (emphasis added).

Emphasizing the former line of cases, the majority resolves the conflict in favor of strict scrutiny. I disagree. The Constitution has always demanded less within the prison walls. Time and again, even when faced with constitutional rights no less "fundamental" than the right to be free from state-sponsored racial discrimination, we have deferred to the reasonable judgments of officials experienced in running this Nation's prisons. There is good reason for such deference in this case. California oversees roughly 160,000 inmates in prisons that have been a breeding ground for some of the most violent prison gangs in America—all of them organized along racial lines. In that atmosphere, California racially segregates a portion of its inmates, in a part of its prisons, for brief periods of up to 60 days, until the State can arrange permanent housing. The majority is concerned with sparing inmates the indignity and stigma of racial discrimination. *Ante*, at 507–508. California is concerned with their safety and saving their lives. I respectfully dissent.

I

To understand this case, one must understand just how limited the policy at issue is. That requires more factual background than the Court's opinion provides. Petitioner Garrison Johnson is a black inmate in the California Department of Corrections (CDC), currently serving his sentence for murder, robbery, and assault with a deadly weapon. App. 255a–256a, 259a. Johnson began serving his sentence in June 1987 at the California Institution for Men in Chino, California. *Id.*, at 79a, 264a. Since that time he has been transferred to a number of other facilities within the CDC. *Id.*, at 79a–82a.

When an inmate like Johnson is admitted into the California prison system or transferred between the CDC's institutions, he is housed initially for a brief period—usually no more than 60 days—in one of California's prison reception centers for men. *Id.*, at 303a–305a. CDC, Department Operations Manual §61010.3 (2004) (hereinafter CDC Operations Manual), available at http://www.corr.ca.gov/RegulationsPolicies/PDF/DOM/00_dept_ops_maunal.pdf (all Internet materials as visited Feb. 18, 2005, and available in Clerk of Court's case file). In 2003, the centers processed more than 40,000 newly admitted inmates, almost 72,000 inmates returned from parole, over 14,000 inmates admitted for other reasons, and some portion of the 254,000 inmates who were transferred from one prison to another. CDC, Movement of Prison Population 3 (2003).

At the reception center, prison officials have limited information about an inmate, "particularly if he has never been housed in any CDC facility." App. 303a. The inmate therefore is classified so that prison officials can place the inmate in appropriate permanent housing. During this process, the CDC evaluates the inmate's "physical, mental and emotional health." *Ibid.* The CDC also reviews the inmate's criminal

history and record in jail to assess his security needs and classification level. *Id.*, at 304a. Finally, the CDC investigates whether the inmate has any enemies in prison. *Ibid.* This process determines the inmate's ultimate housing placement and has nothing to do with race.

While the process is underway, the CDC houses the inmate in a one-person cell, a two-person cell, or a dormitory. *Id.*, at 305a. The few single cells available at reception centers are reserved for inmates who present special security problems, including those convicted of especially heinous crimes or those in need of protective custody. See, *e. g.*, CDC Operations Manual § 61010.11.3. At the other end of the spectrum, lower risk inmates are assigned to dormitories. App. 189a–190a. Placement in either a single cell or a dormitory has nothing to do with race, except that prison officials attempt to maintain a racial balance within each dormitory. *Id.*, at 250a. Inmates placed in single cells or dormitories lead fully integrated lives: The CDC does not distinguish based on race at any of its facilities when it comes to jobs, meals, yard and recreation time, or vocational and educational assignments. *Ibid.*

Yet some prisoners, like Johnson, neither require confinement in a single cell nor may be safely housed in a dormitory. The CDC houses these prisoners in double cells during the 60-day period. In pairing cellmates, race is indisputably the predominant factor. *Id.*, at 305a, 309a. California's reason is simple: Its prisons are dominated by violent gangs. Brief for Respondents 1–5. And as the largest gangs' names indicate—the Aryan Brotherhood, the Black Guerrilla Family, the Mexican Mafia, the Nazi Low Riders, and La Nuestra Familia—they are organized along racial lines. See Part II–B, *infra*.

According to the State, housing inmates in double cells without regard to race threatens not only prison discipline, but also the physical safety of inmates and staff. App. 305a–306a, 310a–311a. That is because double cells are es-

pecially dangerous. The risk of racial violence in public areas of prisons is high, and the tightly confined, private conditions of cells hazard even more violence. Prison staff cannot see into the cells without going up to them, and inmates can cover the windows to prevent the staff from seeing inside the cells. *Id.*, at 306a. The risk of violence caused by this privacy is grave, for inmates are confined to their cells for much of the day. *Ibid.*; *id.*, at 187a–188a.

Nevertheless, while race is the predominant factor in pairing cellmates, it is hardly the only one. After dividing this subset of inmates based on race, the CDC further divides them based on geographic or national origin. As an example, Hispanics from northern and southern California are not housed together in reception centers because they often belong to rival gangs—La Nuestra Familia and the Mexican Mafia, respectively. *Id.*, at 185a. Likewise, Chinese and Japanese inmates are not housed together, nor are Cambodians, Filipinos, Laotians, or Vietnamese. *Id.*, at 189a. In addition to geographic and national origin, prison officials consider a host of other factors, including inmates' age, mental health, medical needs, criminal history, and gang affiliation. *Id.*, at 304a, 309a. For instance, when Johnson was admitted in 1987, he was a member of the Crips, a black street gang. *Id.*, at 93a. He was therefore ineligible to be housed with nonblack inmates. *Id.*, at 183a; Brief for Respondents 12, n. 9.

Moreover, while prison officials consider race in assigning inmates to double cells, the record shows that inmates are not necessarily housed with other inmates of the same race during that 60-day period. When a Hispanic inmate affiliated with the Crips asked to be housed at the reception center with a black inmate, for example, prison administrators granted his request. App. 183a–184a, 199a. Such requests are routinely granted after the 60-day period, when prison officials complete the classification process and transfer an

inmate from the reception center to a permanent placement at that prison or another one.[1] *Id.*, at 311a–312a.

II

Traditionally, federal courts rarely involved themselves in the administration of state prisons, "adopt[ing] a broad hands-off attitude toward problems of prison administration."[2] *Procunier* v. *Martinez*, 416 U. S. 396, 404 (1974). For most of this Nation's history, only law-abiding citizens could claim the cover of the Constitution: Upon conviction and incarceration, defendants forfeited their constitutional rights and possessed instead only those rights that the State chose to extend them. See, *e. g.*, *Shaw* v. *Murphy*, 532 U. S. 223, 228 (2001); *Ruffin* v. *Commonwealth*, 62 Va. 790, 796 (1871). In recent decades, however, this Court has decided

[1] Johnson has never requested—not during his initial admittance, nor his subsequent transfers, nor his present incarceration—that he be housed with a person of a different race. App. 106a, 112a–113a, 175a. According to Johnson, he considered the policy a barrier to any such request; however, Johnson has also testified that he never filed a grievance with prison officials about the segregation policy. *Id.*, at 112a–113a, 124a–125a. Neither the parties nor the majority discusses whether Johnson has exhausted his action under Rev. Stat. § 1979, 42 U. S. C. § 1983, as required by the Prison Litigation Reform Act of 1995, 110 Stat. 1321–66, as amended, 42 U. S. C. § 1997e(a). See *Booth* v. *Churner*, 532 U. S. 731, 734 (2001). The majority thus assumes that statutorily mandated exhaustion is not jurisdictional, and that California has waived the issue by failing to raise it. See, *e. g.*, *Richardson* v. *Goord*, 347 F. 3d 431, 433–434 (CA2 2003); *Perez* v. *Wisconsin Dept. of Corrections*, 182 F. 3d 532, 536 (CA7 1999).

[2] The majority refers to my approach as a "hands-off" one because I would accord deference to the judgments of the State's prison officials. See *ante*, at 506, n. 1. Its label is historically inaccurate. The "hands-off" approach was that taken prior to the 1960's by federal courts, which generally declined to consider the merits of prisoners' claims. See, *e. g.*, J. Fliter, Prisoners' Rights: The Supreme Court and Evolving Standards of Decency 64–65 (2001); M. Feeley & E. Rubin, Judicial Policy Making and the Modern State 30–34 (2000); S. Krantz & L. Branham, Cases and Materials on the Law of Sentencing, Corrections and Prisoners' Rights 264–265 (4th ed. 1991).

that incarceration does not divest prisoners of all constitutional protections. See, *e. g.*, *Wolff* v. *McDonnell*, 418 U. S. 539, 555–556 (1974) (the right to due process); *Cruz* v. *Beto*, 405 U. S. 319, 322 (1972) *(per curiam)* (the right to free exercise of religion).[3]

At the same time, this Court quickly recognized that the extension of the Constitution's demands behind prison walls had to accommodate the needs of prison administration. This Court reached that accommodation in *Turner* v. *Safley*, 482 U. S. 78 (1987), which "adopted a unitary, deferential standard for reviewing prisoners' constitutional claims," *Shaw*, *supra*, at 229. That standard should govern Johnson's claims, as it has governed a host of other claims challenging conditions of confinement, even when restricting the rights at issue would otherwise have occasioned strict scrutiny. Under the *Turner* standard, the CDC's policy passes constitutional muster because it is reasonably related to legitimate penological interests.

A

Well before *Turner*, this Court recognized that experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country. See, *e. g.*, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 125 (1977) (courts must give "appropriate deference to the decisions of prison administrators"); *Procunier*, *supra*, at 405 ("[C]ourts are ill equipped to deal with the increasingly urgent problems of prison ad-

[3] A prisoner may not entirely surrender his constitutional rights at the prison gates, *Bell* v. *Wolfish*, 441 U. S. 520, 545 (1979); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 129 (1977), but certainly he leaves some of his liberties behind him. When a prisoner makes a constitutional claim, the initial question should be whether the prisoner possesses the right at issue at all, or whether instead the prisoner has been divested of the right as a condition of his conviction and confinement. See *Overton* v. *Bazzetta*, 539 U. S. 126, 140 (2003) (THOMAS, J., concurring in judgment); *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (CA6 1944).

ministration and reform"). *Turner* made clear that a deferential standard of review would apply across the board to inmates' constitutional challenges to prison policies.

At issue in *Turner* was the constitutionality of a pair of Missouri prison regulations limiting inmate-to-inmate correspondence and inmate marriages. The Court's analysis proceeded in two steps. First, the Court recognized that prisoners are not entirely without constitutional rights. As proof, it listed certain constitutional rights retained by prisoners, including the right to be "protected against invidious racial discrimination . . . , *Lee* v. *Washington*, 390 U. S. 333 (1968)." *Turner*, 482 U. S., at 84. Second, the Court concluded that for prison administrators rather than courts to "'make the difficult judgments concerning institutional operations,'" *id.*, at 89 (quoting *Jones*, *supra*, at 128), courts should uphold prison regulations that impinge on those constitutional rights if they reasonably relate to legitimate penological interests, 482 U. S., at 89. Nowhere did the Court suggest that *Lee*'s right to be free from racial discrimination was immune from *Turner*'s deferential standard of review. To the contrary, "[w]e made quite clear that the standard of review we adopted in *Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." *Harper*, 494 U. S., at 224 (emphasis added).

Consistent with that understanding, this Court has applied *Turner*'s standard to a host of constitutional claims by prisoners, regardless of the standard of review that would apply outside prison walls.[4] And this Court has adhered to

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[4] See, *e. g.*, *Overton*, *supra*, at 132 (the right to association under the First and Fourteenth Amendments); *Shaw* v. *Murphy*, 532 U. S. 223, 228–229 (2001) (the right to communicate with fellow inmates under the First Amendment); *Lewis* v. *Casey*, 518 U. S. 343, 361 (1996) (the right of access to the courts under the Due Process and Equal Protection Clauses); *Washington* v. *Harper*, 494 U. S. 210, 223–225 (1990) (the right to refuse forced medication under the Due Process Clause); *Thornburgh* v. *Abbott*, 490 U. S. 401, 413–414 (1989) (the right to receive correspondence under the

Turner despite being urged to adopt different standards of review based on the constitutional provision at issue. See *Harper*, *supra*, at 224 (*Turner*'s standard of review "appl[ies] in all cases in which a prisoner asserts that a prison regulation violates the Constitution, *not just those in which the prisoner invokes the First Amendment*" (emphasis added)); *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 353 (1987) ("We take this opportunity to reaffirm our refusal, *even where claims are made under the First Amendment*, to substitute our judgment on . . . difficult and sensitive matters of institutional administration for the determinations of those charged with the formidable task of running a prison" (internal quotation marks and citation omitted; emphasis added)). Our steadfast adherence makes sense: If *Turner* is our accommodation of the Constitution's demands to those of prison administration, see *supra*, at 530, we should apply it uniformly to prisoners' challenges to their conditions of confinement.

After all, Johnson's claims, even more than other claims to which we have applied *Turner*'s test, implicate *Turner*'s rationale. In fact, in a passage that bears repeating, the *Turner* Court explained precisely why deference to the judgments of California's prison officials is necessary:

> "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative

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First Amendment); *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 349–350 (1987) (the right to free exercise of religion under the First Amendment).

> problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration." 482 U. S., at 89 (internal quotation marks and alteration omitted).

The majority's failure to heed that advice is inexplicable, especially since *Turner* itself recognized the "growing problem with prison gangs." *Id.*, at 91. In fact, there is no more "intractable problem" inside America's prisons than racial violence, which is driven by race-based prison gangs. See, *e. g.*, *Dawson* v. *Delaware*, 503 U. S. 159, 172–173, and n. 1 (1992) (THOMAS, J., dissenting); *Stefanow* v. *McFadden*, 103 F. 3d 1466, 1472 (CA9 1996) ("Anyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism and religious bigotry").

B

The majority decides this case without addressing the problems that racial violence poses for wardens, guards, and inmates throughout the federal and state prison systems. But that is the core of California's justification for its policy: It maintains that, if it does not racially separate new cellmates thrown together in close confines during their initial admission or transfer, violence will erupt.

The dangers California seeks to prevent are real. See Brief for National Association of Black Law Enforcement Officers, Inc., as *Amicus Curiae* 12. Controlling prison gangs is the central challenge facing correctional officers and administrators. Carlson, Prison Interventions: Evolving Strategies to Control Security Threat Groups, 5 Corrections Mgmt. Q. 10 (Winter 2001) (hereinafter Carlson). The worst gangs are highly regimented and sophisticated organizations that commit crimes ranging from drug trafficking to theft and murder. *Id.*, at 12; Cal. Dept. of Justice, Division of Law Enforcement, Organized Crime in California Annual Report to the California Legislature 2003, p. 15, available

at http://caag.state.ca.us/publications/org_crime.pdf. In fact, street gangs are often just an extension of prison gangs, their "'foot soldiers'" on the outside. *Ibid.;* Willens, Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962–1987, 37 Am. U. L. Rev. 41, 55–56 (1987). And with gang membership on the rise, the percentage of prisoners affiliated with prison gangs more than doubled in the 1990's.[5]

The problem of prison gangs is not unique to California,[6] but California has a history like no other. There are at least five major gangs in this country—the Aryan Brotherhood, the Black Guerrilla Family, the Mexican Mafia, La Nuestra Familia, and the Texas Syndicate—all of which originated in California's prisons.[7] Unsurprisingly, then, California has the largest number of gang-related inmates of any correctional system in the country, including the Federal Government. Carlson 16.

As their very names suggest, prison gangs like the Aryan Brotherhood and the Black Guerrilla Family organize themselves along racial lines, and these gangs perpetuate hate and violence. Irwin 182, 184. Interracial murders and as-

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[5] See National Gang Crime Research Center, A National Assessment of Gangs and Security Threat Groups (STGs) in Adult Correctional Institutions: Results of the 1999 Adult Corrections Survey, p. 5, http://www.ngcrc.com/ngcrc/page7.htm.

[6] See, *e. g., Fraise* v. *Terhune*, 283 F. 3d 506, 512–513 (CA3 2002) (describing violence caused by a single black prison gang, the Five Percent Nation, in various New Jersey correctional facilities); *Conroy* v. *Dingle*, No. Civ. 01–1626 (RHK/RLE), 2002 WL 31357055, *1–*2 (D. Minn., Oct. 11, 2002) (describing rival racial gangs at Minnesota's Moose Lake facility, a medium security prison).

[7] See D. Orlando-Morningstar, Prison Gangs, Special Needs Offenders Bulletin, Federal Judicial Center 4 (Oct. 1997); see also J. Irwin, Prisons in Turmoil 189 (1980) (hereinafter Irwin) (describing the establishment and rise of gangs inside the California prison system, first the Mexican Mafia, followed by La Nuestra Familia, the Aryan Brotherhood, and the Black Guerrilla Family); *United States* v. *Shryock*, 342 F. 3d 948, 961 (CA9 2003) (detailing rise of Mexican Mafia inside the California prison system).

saults among inmates perpetrated by these gangs are common.[8] And, again, that brutality is particularly severe in California's prisons. See, *e. g.*, *Walker* v. *Gomez*, 370 F. 3d 969, 971 (CA9 2004) (describing "history of significant racial tension and violence" at Calipatria State Prison); *id.*, at 979–980 (Rymer, J., dissenting) (same); App. 297a–299a (describing 2-year span at Pelican Bay Prison, during which there were no fewer than nine major riots that left at least one inmate dead and many more wounded).

C

It is against this backdrop of pervasive racial violence that California racially segregates inmates in the reception centers' double cells, for brief periods of up to 60 days, until such time as the State can assign permanent housing. Viewed in that context and in light of the four factors enunciated in *Turner*, California's policy is constitutional: The CDC's policy is reasonably related to a legitimate penological interest; alternative means of exercising the restricted right remain open to inmates; racially integrating double cells might negatively impact prison inmates, staff, and administrators; and there are no obvious, easy alternatives to the CDC's policy.

1

First, the policy is reasonably related to a legitimate penological interest. *Turner*, *supra*, at 89. The protection of inmates and staff is undeniably a legitimate penological interest. See *Bell* v. *Wolfish*, 441 U. S. 520, 546–547 (1979).

[8] See, *e. g.*, *id.*, at 962–969 (describing a host of murders and attempted murders by a handful of Mexican Mafia members); *United States* v. *Silverstein*, 732 F. 2d 1338, 1341–1342 (CA7 1984) (describing murder of a black inmate by members of the Aryan Brotherhood); *State* v. *Kell*, 61 P. 3d 1019, 1024–1025 (Utah 2002) (describing fatal stabbing of a black inmate by two white supremacists); *State* v. *Farmer*, 126 Ariz. 569, 570–571, 617 P. 2d 521, 522–523 (1980) (en banc) (describing murder of a black inmate by members and recruits of the Aryan Brotherhood).

The evidence shows, and Johnson has never contested, that the objective of California's policy is reducing violence among the inmates and against the staff. No cells are designated for, nor are special privileges afforded to, any racial group. App. 188a, 305a. Because prison administrators use race as a factor in making initial housing assignments "solely on the basis of [its] potential implications for prison security," the CDC's cell assignment practice is neutral. *Thornburgh* v. *Abbott*, 490 U. S. 401, 415 (1989); *Turner*, 482 U. S., at 90.

California's policy bears a valid, rational connection to this interest. The racial component to prison violence is impossible for prison administrators to ignore. Johnson himself testified that he is afraid of violence—based solely on the color of his skin.[9] In combating that violence, an inmate's arrival or transfer into a new prison setting is a critical time for inmate and staff alike. The policy protects an inmate from other prisoners, and they from him, while prison officials gather more information, including his gang affiliation, about his compatibility with other inmates. App. 249a. This connection between racial violence and the policy makes it far from "arbitrary or irrational." *Turner*, *supra*, at 89–90.

Indeed, Johnson concedes that it would be perfectly constitutional for California to take account of race "as part of an overall analysis of proclivity to violence based upon a series of facts existing in that prison." Tr. of Oral Arg. 15. But that is precisely what California does. It takes into account a host of factors in addition to race: geographic or national

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[9] Specifically, Johnson testified:

"I was incarcerated at Calipatria before the major riot broke out there with Mexican and black inmates. . . . If I would have stayed there, I would have been involved in that because you have four facilities there and *each facility went on a major riot and a lot of people got hurt and injured just based on your skin color.* I'm black, and if I was there I would have been hurt." App. 102a (emphasis added).

origin, age, physical size, mental health, medical needs, criminal history, and, of course, gang affiliation. *Supra*, at 527. California does not simply assign inmates to double cells in the reception centers based on race—it also separates *intra*-racially (for example, northern from southern Hispanics or violent from nonviolent offenders).

2

Second, alternative means of exercising the restricted right remain open to inmates like Johnson. *Turner, supra*, at 90. The CDC submits, and Johnson does not contest, that all other facets of prison life are fully integrated: work, vocational, and educational assignments; dining halls; and exercise yards and recreational facilities. App. 250a. And after a brief detention period at the reception center, inmates may select their own cellmates regardless of race in the absence of overriding security concerns. *Id.*, at 311a–312a. Simply put, Johnson has spent, and will continue to spend, the vast bulk of his sentence free from any limitation on the race of his cellmate.

3

Third, Johnson fails to establish that the accommodation he seeks—*i. e.*, assigning inmates to double cells without regard to race—would not significantly impact prison personnel, other inmates, and the allocation of prison resources. *Harper*, 494 U. S., at 226–227; *Turner, supra*, at 90. Prison staff cannot see into the double cells without going up to them, and inmates can cover the windows so that staff cannot see inside the cells at all. App. 306a. Because of the limited number of staff to oversee the many cells, it "would be very difficult to assist inmates if the staff were needed in several places at one time." *Ibid.* Coordinated gang attacks against nongang cellmates could leave prison officials unable to respond effectively. In any event, diverting prison resources to monitor cells disrupts services elsewhere.

Then, too, fights in the cells are likely to spill over to the exercise yards and common areas. *Ibid.*; see also *id.*, at 187a. As *Turner* made clear: "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." 482 U. S., at 90; see also *White* v. *Morris*, 832 F. Supp. 1129, 1130 (SD Ohio 1993) (racially integrated double-celling contributed to a race riot in which 10 people were murdered). California prison officials are united in the view that racially integrating double cells in the reception centers would lead to serious violence.[10] This is precisely the sort of testimony that the Court found persuasive in *Turner* itself. 482 U. S., at 92.

4

Finally, Johnson has not shown that there are "obvious, easy alternatives" to the CDC's policy. *Id.*, at 90. Johnson contends that, for newly admitted inmates, prison officials need only look to the information available in the presentence report that must accompany a convict to prison. See Cal. Penal Code Ann. § 1203(c) (West 2004); Cal. Rules of Ct., Crim., Rule 4.411(d) (West Supp. 2004). But prison officials already do this to the extent that they can. Indeed, gang affiliation, not race, is the first factor in determining initial housing assignments. App. 315a. Race becomes the predominant factor only because gang affiliation is often not known, especially with regard to newly admitted inmates. As the Court of Appeals pointed out: "There is little chance

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[10] See *id.*, at 245a–246a (Cambra declaration) ("If race were to be disregarded entirely, however, I am certain, based upon my experience with CDC prisoners, that . . . there will be fights in the cells and the problems will emanate onto the prison yards"); *id.*, at 250a–251a (Schulteis declaration) ("At CSP-Lancaster, if we were to disregard the initial housing placement [according to race], then I am certain there would be serious violence among inmates. I have worked in five different CDC institutions and this would be true for all of them").

that inmates will be forthcoming about their past violent episodes or criminal gang activity so as to provide an accurate and dependable picture of the inmate." 321 F. 3d 791, 806 (CA9 2003); see also App. 185a, 189a. Even if the CDC had the manpower and resources to prescreen the more than 40,000 new inmates it receives yearly, leafing through presentence reports would not tell prison officials what they need to know. See *ante*, at 521–523 (STEVENS, J., dissenting).

Johnson presents a closer case with regard to the segregation of prisoners whom the CDC transfers between facilities. As I understand it, California has less need to segregate prisoners about whom it already knows a great deal (since they have undergone the initial classification process and been housed for some period of time). However, this does not inevitably mean that racially integrating transferred inmates, while obvious and easy, is a true alternative. For instance, an inmate may have affiliated with a gang since the CDC's last official assessment, or his past lack of racial violence may have been due to the absence of close confinement with members of other races. The CDC's policy does not appear to arise from laziness or neglect; California is a leader in institutional intelligence gathering. See Carlson 16 ("The CDC devotes 75 intelligence staff to gathering and verifying inmate-related information," both in prisons and on the streets). In short, applying the policy to transfers is not "arbitrary or irrational," requiring that we set aside the considered contrary judgment of prison administrators. *Turner*, *supra*, at 89–90.

III

The majority claims that strict scrutiny is the applicable standard of review based on this Court's precedents and its general skepticism of racial classifications. It is wrong on both scores.

A

Only once before, in *Lee* v. *Washington*, 390 U. S. 333 (1968) *(per curiam)*, has this Court considered the constitu-

tionality of racial classifications in prisons. The majority claims that *Lee* applied "a heightened standard of review." *Ante*, at 506. But *Lee* did not address the applicable standard of review. And even if it bore on the standard of review, *Lee* would support the State here.

In *Lee*, a three-judge District Court ordered Alabama to desegregate its prisons under *Brown* v. *Board of Education*, 347 U. S. 483 (1954). *Washington* v. *Lee*, 263 F. Supp. 327, 331–332 (MD Ala. 1966). In so doing, the District Court rejected any notion that "consideration[s] of prison security or discipline" justified the "complete and permanent segregation of the races in all the Alabama penal facilities." *Id.*, at 331. However, the District Court noted "that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period." *Ibid.* (footnote omitted). It provided only one example—"the 'tank' used in . . . large municipal jails where intoxicated persons are placed upon their initial incarceration and kept until they become sober," *id.*, at 331, n. 6—and the court left unmentioned why it would have been necessary to separate drunk whites from blacks on a Birmingham Saturday night.

This Court, in a *per curiam*, one-paragraph opinion, affirmed the District Court's order. It found "unexceptionable" not only the District Court's general rule that wholesale segregation of penal facilities was unconstitutional, but also the District Court's "allowance for the necessities of prison security and discipline." *Lee*, 390 U. S., at 334. Indeed, Justices Black, Harlan, and Stewart concurred

> "to make explicit something that is left to be gathered only by implication from the Court's opinion. This is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Ibid.*

Those Justices were "unwilling to assume" that such an "explicit pronouncement [would] evinc[e] any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Ibid.*

Lee said nothing about the applicable standard of review, for there was no need. Surely Alabama's wholesale segregation of its prisons was unconstitutional even under the more deferential standard of review that applies within prisons. This Court's brief, *per curiam* opinion in *Lee* simply cannot bear the weight or interpretation the majority places on it. See *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 24 (1994) (noting "our customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion"); *Edelman* v. *Jordan*, 415 U. S. 651, 670–671 (1974).

Yet even if *Lee* had announced a heightened standard of review for prison policies that pertain to race, *Lee* also carved out an exception to the standard that California's policy would certainly satisfy. As the *Lee* concurrence explained without objection, the Court's exception for "the necessities of prison security and discipline" meant that "prison authorities have the right, acting in *good faith* and in *particularized circumstances*, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." 390 U. S., at 334 (opinion of Black, Harlan, and Stewart, JJ., concurring) (emphasis added).

California's policy—which is a far cry from the wholesale segregation at issue in *Lee*—would fall squarely within *Lee*'s exception. Johnson has never argued that California's policy is motivated by anything other than a desire to protect inmates and staff. And the "particularized" nature of the policy is evident: It applies only to new inmates and transfers, only in a handful of prisons, only to double cells, and only then for a period of no more than two months. In the name of following a test that *Lee* did not create, the majority

opts for a more demanding standard of review than *Lee*'s language even arguably supports.

The majority heavily relies on this Court's statement that "'all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.'" *Ante*, at 505 (emphasis deleted) (quoting *Adarand Constructors, Inc.*, 515 U. S., at 227). *Adarand* has nothing to do with this case. *Adarand*'s statement that "all racial classifications" are subject to strict scrutiny addressed the contention that classifications favoring rather than disfavoring blacks are exempt. *Id.*, at 226–227; accord, *Grutter* v. *Bollinger*, 539 U. S. 306, 353 (2003) (THOMAS, J., concurring in part and dissenting in part). None of these statements overruled, *sub silentio*, *Turner* and its progeny, especially since the Court has repeatedly held that constitutional demands are diminished in the unique context of prisons. See, *e. g.*, *Harper*, 494 U. S., at 224; *Abbott*, 490 U. S., at 407; *Turner*, 482 U. S., at 85; see also *Webster* v. *Fall*, 266 U. S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

B

The majority offers various other reasons for applying strict scrutiny. None is persuasive. The majority's main reason is that "*Turner*'s reasonable-relationship test [applies] *only* to rights that are 'inconsistent with proper incarceration.'" *Ante*, at 510 (quoting *Overton* v. *Bazzetta*, 539 U. S. 126, 131 (2003)). According to the majority, the question is thus whether a right "need necessarily be compromised for the sake of proper prison administration." *Ante*, at 510. This inconsistency-with-proper-prison-administration test begs the question at the heart of this case. For a court to know whether any particular right is inconsistent with proper prison administration, it must have some implicit notion of what a proper prison ought to look like and how it

ought to be administered. *Overton, supra*, at 139 (THOMAS, J., concurring in judgment). But the very issue in this case is whether such second-guessing is permissible.

The majority's test eviscerates *Turner*. Inquiring whether a given right is consistent with "proper prison administration" calls for precisely the sort of judgments that *Turner* said courts were ill equipped to make. In none of the cases in which the Court deferred to the judgments of prison officials under *Turner* did it examine whether "proper" prison security and discipline permitted greater speech or associational rights *(Abbott, supra; Shaw*, 532 U. S. 223; and *Overton, supra);* expanded access to the courts (*Lewis* v. *Casey*, 518 U. S. 343 (1996)); broader freedom from bodily restraint *(Harper, supra);* or additional free exercise rights (*O'Lone*, 482 U. S. 342). The Court has steadfastly refused to undertake the threshold standard-of-review inquiry that *Turner* settled, and that the majority today resurrects. And with good reason: As *Turner* pointed out, these judgments are better left in the first instance to the officials who run our Nation's prisons, not to the judges who run its courts.

In place of the Court's usual deference, the majority gives conclusive force to its own guesswork about "proper" prison administration. It hypothesizes that California's policy might incite, rather than diminish, racial hostility.[11] *Ante*,

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[11] The majority's sole empirical support for its speculation is a study of Texas prison desegregation that found the rate of violence higher in racially segregated double cells. *Ante*, at 507–508 (citing Trulson & Marquart, The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons, 36 Law & Soc. Rev. 743, 774 (2002)). However, the study's authors specifically note that Texas—like California—does not integrate its "initial diagnostic facilities" or its "transfer facilities." See *id.*, at 753, n. 13. Thus the study says nothing about the violence likely to result from integrating cells when inmates are thrown together for brief periods during admittance or transfer. What the study does say is that, once Texas has had the time to gather inmate-related information and make more permanent housing assignments, racially inte-

at 506–508. The majority's speculations are implausible. New arrivals have a strong interest in promptly convincing other inmates of their willingness to use violent force. See Brief for National Association of Black Law Enforcement Officers, Inc., as *Amicus Curiae* 13–14 (citing commentary and congressional findings); cf. *United States* v. *Santiago*, 46 F. 3d 885, 888 (CA9 1995) (describing one Hispanic inmate's murder of another in order to join the Mexican Mafia); *United States* v. *Silverstein*, 732 F. 2d 1338, 1341 (CA7 1984) (prospective members of the Aryan Brotherhood must "make bones," or commit a murder, to be eligible for membership). In any event, the majority's guesswork falls far short of the compelling showing needed to overcome the deference we owe to prison administrators.

The majority contends that the Court "[has] put the burden on state actors to demonstrate that their race-based policies are justified," *ante*, at 506, n. 1, and "[has] refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion," *ante*, at 512. Yet two Terms ago, in upholding the University of Michigan Law School's affirmative-action program, this Court deferred to the judgment by the law school's faculty and administrators on their need for diversity in the student body. See *Grutter*, *supra*, at 328 ("The Law School's educational judgment that . . . diversity is essential to its educational mission is one to which we defer"). Deference would seem all the more warranted in the prison context, for whatever the Court knows of administering educational institutions, it knows much less about administering penal ones. The potential consequences of second-guessing the judgments of prison administrators are also much more severe. See *White* v. *Morris*, 832 F. Supp. 1129, 1130 (SD Ohio 1993) (racially integrated double-celling that resulted

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grated cells may be the preferred option. But California leaves open that door: Inmates are generally free to room with whomever they like on a permanent basis.

from federal consent decree was a factor in the worst prison riot in Ohio history). More importantly, as I have explained, the Court has recognized that the typically exacting review it applies to restrictions on fundamental rights must be relaxed in the unique context of prisons. See, *e. g.*, *Harper*, 494 U. S., at 224; *Abbott*, 490 U. S., at 407; *Turner*, 482 U. S., at 85. The majority cannot fall back on the Constitution's usual demands, because those demands have always been lessened inside the prison walls. See *supra*, at 529.

The majority also mentions that California's policy may be the only one of its kind, as virtually all other States and the Federal Government manage their prison systems without racially segregating inmates. *Ante*, at 508–509. This is both irrelevant and doubtful. It is irrelevant because the number of States that have followed California's lead matters not to the applicable standard of review (the only issue the Court today decides), but to whether California satisfies whatever standard applies, a question the majority leaves to be addressed on remand. In other words, the uniqueness of California's policy might show whether the policy is reasonable or narrowly tailored—but deciding whether to apply *Turner* or strict scrutiny in the first instance must depend on something else, like the majority's inconsistency-with-proper-prison-administration test. The commonness of California's housing policy is further irrelevant because strict scrutiny now applies to all claims of racial discrimination in prisons, regardless of whether the policies being challenged are unusual.

The majority's assertion is doubtful, because at least two other States apply similar policies to newly admitted inmates. Both Oklahoma and Texas, like California, assign newly admitted inmates to racially segregated cells in their prison reception centers.[12] The similarity is not surprising:

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[12] See Oklahoma Dept. of Corrections, Policies and Procedures, Operations Memorandum No. OP–030102, Inmate Housing (Sept. 16, 2004) ("Upon arrival at the assessment and reception center . . . [f]or reasons of

States like California and Texas have historically had the most severe problems with prison gangs. However, even States with less severe problems maintain that policies like California's are necessary to deal with race-related prison violence. See Brief for States of Utah, Alabama, Alaska, Delaware, Idaho, Nevada, New Hampshire and North Dakota as *Amici Curiae* 16. Relatedly, 10.3% of all wardens at maximum security facilities in the United States report that their inmates are assigned to racially segregated cells—apparently on a *permanent* basis. Henderson, Cullen, Carroll, & Feinberg, Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells, 80 Prison J. 295, 304 (Sept. 2000). In the same survey, 4.3% of the wardens report that their States have an official policy against racially integrating male inmates in cells. *Id.*, at 302. Presumably, for the remainder of prisons in which inmates are assigned to racially segregated cells, that policy is the result of discretionary decisions by wardens rather than of official state directives. *Ibid.* In any event, the ongoing debate about the best way to reduce racial violence in prisons should not be resolved by judicial decree: It is the job "of prison administrators . . . and not the courts, to make the difficult judgments concerning institutional operations." *Jones*, 433 U. S., at 128.

The majority also observes that we have already carved out an exception to *Turner* for Eighth Amendment claims of cruel and unusual punishment in prison. See *Hope* v. *Pelzer*,

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safety and security, newly received inmates are not generally assigned randomly to racially integrated cells") (available at http://www.doc.state.ok.us/docs/policies.htm); Texas Dept. of Criminal Justice, Security Memorandum No. SM–01.28, Assignment to General Population Two-Person Cells (June 15, 2002) ("Upon arrival at a reception and diagnostic center . . . [f]or reasons of safety and security, newly-received offenders are not generally assigned randomly to racially integrated cells due to the fact that the specific information needed to assess an offender's criminal and victimization history is not available until after diagnostic processing has been completed").

536 U. S. 730, 738 (2002). In that context, we have held that "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer* v. *Brennan*, 511 U. S. 825, 828 (1994). Setting aside whether claims challenging inmates' conditions of confinement should be cognizable under the Eighth Amendment at all, see *Hudson* v. *McMillian*, 503 U. S. 1, 18–19 (1992) (THOMAS, J., dissenting), the "deliberate indifference" standard does not bolster the majority's argument. If anything, that standard is *more* deferential to the judgments of prison administrators than *Turner*'s reasonable-relationship test: It subjects prison officials to liability only when they are subjectively aware of the risk to the inmate, and they fail to take reasonable measures to abate the risk. *Farmer*, *supra*, at 847. It certainly does not demonstrate the wisdom of an exception that imposes a heightened standard of review on the actions of prison officials.

Moreover, the majority's decision subjects prison officials to competing and perhaps conflicting demands. In this case, California prison officials have uniformly averred that random double-celling poses a substantial risk of serious harm to the celled inmates. App. 245a–246a, 251a. If California assigned inmates to double cells without regard to race, knowing full well that violence might result, that would seem the very definition of deliberate indifference. See *Robinson* v. *Prunty*, 249 F. 3d 862, 864–865 (CA9 2001) (prisoner alleged an Eighth Amendment violation because administrators had *failed* to consider race when releasing inmates into the yards); *Jensen* v. *Clarke*, 94 F. 3d 1191, 1201, 1204 (CA8 1996) (court held that random double-celling by prison officials constituted deliberate indifference, and affirmed an injunction and attorney's fees awarded against the officials). Nor would a victimized inmate need to prove that prison officials had anticipated any particular attack; it would be sufficient that prison officials had ignored a dangerous condi-

tion that was chronic and ongoing—like interracial housing in closely confined quarters within prisons dominated by racial gangs. *Farmer, supra,* at 843–844. Under *Farmer,* prison officials could have been ordered to take account of the very thing to which they may now have to turn a blind eye: inmates' race.

Finally, the majority presents a parade of horribles designed to show that applying the *Turner* standard would grant prison officials unbounded discretion to segregate inmates throughout prisons. See *ante,* at 513–514. But we have never treated *Turner* as a blank check to prison officials. Quite to the contrary, this Court has long had "confidence that . . . a reasonableness standard is not toothless." *Abbott,* 490 U. S., at 414 (internal quotation marks omitted). California prison officials segregate only double cells, because only those cells are particularly difficult to monitor—unlike "dining halls, yards, and general housing areas." *Ante,* at 514. Were California's policy not so narrow, the State might well have race-neutral means at its disposal capable of accommodating prisoners' rights without sacrificing their safety. See *Turner,* 482 U. S., at 90–91. The majority does not say why *Turner*'s standard ably polices all other constitutional infirmities, just not racial discrimination. In any event, it is not the refusal to apply—for the first time ever—a strict standard of review in the prison context that is "fundamentally at odds" with our constitutional jurisprudence. *Ante,* at 506, n. 1. Instead, it is the majority's refusal—for the first time ever—to defer to the expert judgment of prison officials.

IV

Even under strict scrutiny analysis, "it is possible, even likely, that prison officials could show that the current policy meets the test." 336 F. 3d 1117, 1121 (CA9 2003) (Ferguson, J., joined by Pregerson, Nelson, and Reinhardt, JJ., dissenting from denial of rehearing en banc). As Johnson concedes, all States have a compelling interest in

maintaining order and internal security within their prisons. See Reply Brief for Petitioner 18; see also *Procunier*, 416 U. S., at 404. Thus the question on remand will be whether the CDC's policy is narrowly tailored to serve California's compelling interest.[13] The other dissent notes the absence of evidence on that question, see *ante*, at 518–521 (opinion of STEVENS, J.), but that is hardly California's fault.

From the outset, Johnson himself has alleged, in terms taken from *Turner*, that the CDC's policy is "not related to a legitimate penological interest." *Johnson* v. *California*, 207 F. 3d 650, 655 (CA9 2000) *(per curiam)* (discussing Johnson's Third Amended Complaint). In reinstating Johnson's equal protection claim following the District Court's dismissal, the Court of Appeals repeated Johnson's allegation, without indicating that strict scrutiny should apply on remand before the District Court.[14] *Ibid.* And on remand, again Johnson alleged only that the CDC's policy "is not reasonably related to the legitimate penological interests of the CDC." App. 51a (Fourth Amended Complaint ¶ 23).

After the District Court granted qualified immunity to some of the defendants, Johnson once again appealed. In his brief before the Court of Appeals, Johnson assumed that

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[13] On the majority's account, deference to the judgments of prison officials in the application of strict scrutiny is presumably warranted to account for "the special circumstances [that prisons] present," *ante*, at 515. See *Grutter* v. *Bollinger*, 539 U. S. 306, 328 (2003). Although I disagree that deference is normally appropriate when scrutinizing racial classifications, there is some logic to the majority's qualification in this case because the Constitution's demands have always been diminished in the prison context. See, *e. g.*, *Harper*, 494 U. S., at 224; *Abbott*, 490 U. S., at 407; *Turner* v. *Safley*, 482 U. S. 78, 85 (1987).

[14] The Court of Appeals cited both *Turner* and *Lee* v. *Washington*, 390 U. S. 333 (1968) *(per curiam)*, for the proposition that certain constitutional protections, among them the protection against state-sponsored racial discrimination, extend to the prison setting. However, the Court of Appeals did not discuss the applicable standard of review, nor did it attempt to resolve the tension between *Turner* and *Lee* that the majority finds.

both *Lee* and *Turner* applied, without arguing that there was any tension between them; indeed, nowhere in his brief did Johnson even mention the words "strict scrutiny." Brief for Appellant in No. 01–56436 (CA9), pp. 20, 26, 2001 WL 34091249. Perhaps as a result, the Court of Appeals did not discuss strict scrutiny in its second decision, the one currently before this Court. The Court of Appeals did find tension between *Lee* and *Turner;* however, it resolved this tension in *Turner*'s favor. 321 F. 3d, at 799. Yet the Court of Appeals accepted *Lee*'s test at face value: Prison officials may only make racial classifications " 'in good faith and in particularized circumstances.' " 321 F. 3d, at 797. The Court of Appeals, like Johnson, did *not* equate *Lee*'s test with strict scrutiny, and in fact it mentioned strict scrutiny only when it quoted the portion of *Turner* that *rejects* strict scrutiny as the proper standard of review in the prison context. 321 F. 3d, at 798. Even Johnson did not make the leap equating *Lee* with strict scrutiny when he requested that the Court of Appeals rehear his case. Appellant's Petition for Panel Rehearing with Suggestion for Rehearing En Banc in No. 01–56436 (CA9), pp. 4–5. That leap was first made by the judges who dissented from the Court of Appeals' denial of rehearing en banc. 336 F. 3d, at 1118 (Ferguson, J., joined by Pregerson, Nelson, and Reinhardt, JJ., dissenting from denial of rehearing en banc).

Thus, California is now, after the close of discovery, subject to a more stringent standard than it had any reason to anticipate from Johnson's pleadings, the Court of Appeals' initial decision, or even the Court of Appeals' decision below. In such circumstances, California should be allowed to present evidence of narrow tailoring, evidence it was never obligated to present in either appearance before the District Court. See *Lucas* v. *South Carolina Coastal Council,* 505 U. S. 1003, 1031–1032 (1992) (remanding for consideration under the correct legal standard); *id.,* at 1033 (KENNEDY, J., concurring in judgment) ("Although we establish a frame-

work for remand, . . . we do not decide the ultimate [constitutional] question [because] [t]he facts necessary to the determination have not been developed in the record").

* * *

Petitioner Garrison Johnson challenges not permanent, but temporary, segregation of only a portion of California's prisons. Of the 17 years Johnson has been incarcerated, California has assigned him a cellmate of the same race for no more than a year (and probably more like four months); Johnson has had black cellmates during the other 16 years, but by his own choice. Nothing in the record demonstrates that if Johnson (or any other prisoner) requested to be housed with a person of a different race, it would be denied (though Johnson's gang affiliation with the Crips might stand in his way). Moreover, Johnson concedes that California's prisons are racially violent places, and that he lives in fear of being attacked because of his race. Perhaps on remand the CDC's policy will survive strict scrutiny, but in the event that it does not, Johnson may well have won a Pyrrhic victory.

Syllabus

ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* SIMMONS

CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 03–633. Argued October 13, 2004—Decided March 1, 2005

At age 17, respondent Simmons planned and committed a capital murder. After he had turned 18, he was sentenced to death. His direct appeal and subsequent petitions for state and federal postconviction relief were rejected. This Court then held, in *Atkins* v. *Virginia*, 536 U. S. 304, that the Eighth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the execution of a mentally retarded person. Simmons filed a new petition for state postconviction relief, arguing that *Atkins*' reasoning established that the Constitution prohibits the execution of a juvenile who was under 18 when he committed his crime. The Missouri Supreme Court agreed and set aside Simmons' death sentence in favor of life imprisonment without eligibility for release. It held that, although *Stanford* v. *Kentucky*, 492 U. S. 361, rejected the proposition that the Constitution bars capital punishment for juvenile offenders younger than 18, a national consensus has developed against the execution of those offenders since *Stanford*.

Held: The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. Pp. 560–579.

(a) The Eighth Amendment's prohibition against "cruel and unusual punishments" must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework this Court has established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." *Trop* v. *Dulles*, 356 U. S. 86, 100–101. In 1988, in *Thompson* v. *Oklahoma*, 487 U. S. 815, 818–838, a plurality determined that national standards of decency did not permit the execution of any offender under age 16 at the time of the crime. The next year, in *Stanford*, a 5-to-4 Court referred to contemporary standards of decency, but concluded the Eighth and Fourteenth Amendments did not proscribe the execution of offenders over 15 but under 18 because 22 of 37 death penalty States permitted that penalty for 16-year-old offenders, and 25 permitted it for 17-year-olds, thereby indicating there was no national consensus. 492 U. S., at 370–371. A plural-

ity also "emphatically reject[ed]" the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty. *Id.*, at 377–378. That same day the Court held, in *Penry* v. *Lynaugh*, 492 U. S. 302, 334, that the Eighth Amendment did not mandate a categorical exemption from the death penalty for mentally retarded persons because only two States had enacted laws banning such executions. Three Terms ago in *Atkins*, however, the Court held that standards of decency had evolved since *Penry* and now demonstrated that the execution of the mentally retarded is cruel and unusual punishment. The *Atkins* Court noted that objective indicia of society's standards, as expressed in pertinent legislative enactments and state practice, demonstrated that such executions had become so truly unusual that it was fair to say that a national consensus has developed against them. 536 U. S., at 314–315. The Court also returned to the rule, established in decisions predating *Stanford*, that the Constitution contemplates that the Court's own judgment be brought to bear on the question of the acceptability of the death penalty. 536 U. S., at 312. After observing that mental retardation diminishes personal culpability even if the offender can distinguish right from wrong, *id.*, at 318, and that mentally retarded offenders' impairments make it less defensible to impose the death penalty as retribution for past crimes or as a real deterrent to future crimes, *id.*, at 319–320, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the Eighth Amendment places a substantive restriction on the State's power to take such an offender's life, *id.*, at 321. Just as the *Atkins* Court reconsidered the issue decided in *Penry*, the Court now reconsiders the issue decided in *Stanford*. Pp. 560–564.

(b) Both objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question, and the Court's own determination in the exercise of its independent judgment, demonstrate that the death penalty is a disproportionate punishment for juveniles. Pp. 564–575.

(1) As in *Atkins*, the objective indicia of national consensus here—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal," 536 U. S., at 316. The evidence of such consensus is similar, and in some respects parallel, to the evidence in *Atkins:* 30 States prohibit the juvenile death penalty, including 12 that have rejected it altogether and 18 that maintain it but, by express provi-

sion or judicial interpretation, exclude juveniles from its reach. Moreover, even in the 20 States without a formal prohibition, the execution of juveniles is infrequent. Although, by contrast to *Atkins*, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been less dramatic, the difference between this case and *Atkins* in that respect is counterbalanced by the consistent direction of the change toward abolition. Indeed, the slower pace here may be explained by the simple fact that the impropriety of executing juveniles between 16 and 18 years old gained wide recognition earlier than the impropriety of executing the mentally retarded. Pp. 564–567.

(2) Rejection of the imposition of the death penalty on juvenile offenders under 18 is required by the Eighth Amendment. Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Atkins*, *supra*, at 319. Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. Juveniles' susceptibility to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson* v. *Oklahoma*, 487 U. S. 815, 835. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford*, *supra*, at 395. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. The *Thompson* plurality recognized the import of these characteristics with respect to juveniles under 16. 487 U. S., at 833–838. The same reasoning applies to all juvenile offenders under 18. Once juveniles' diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty—retribution and deterrence of capital crimes by prospective offenders, *e. g.*, *Atkins*, *supra*, at 319—provides adequate justification for imposing that penalty on juveniles. Although the Court cannot deny or overlook the brutal crimes too many juvenile offenders have committed, it disagrees with petitioner's contention that, given the Court's own insistence on individualized consideration in capital sentencing, it is arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on an offender under 18. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's

objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. When a juvenile commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity. While drawing the line at 18 is subject to the objections always raised against categorical rules, that is the point where society draws the line for many purposes between childhood and adulthood and the age at which the line for death eligibility ought to rest. *Stanford* should be deemed no longer controlling on this issue. Pp. 568–575.

(c) The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18. See, *e. g.*, *Thompson*, *supra*, at 830–831, and n. 31. The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom. Pp. 575–578.

112 S. W. 3d 397, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 587. O'CONNOR, J., filed a dissenting opinion, *post*, p. 587. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 607.

James R. Layton, State Solicitor of Missouri, argued the cause for petitioner. With him on the briefs were *Jeremiah W. (Jay) Nixon*, Attorney General, and *Stephen D. Hawke* and *Evan J. Buchheim*, Assistant Attorneys General.

Seth P. Waxman argued the cause for respondent. With him on the brief were *David W. Ogden* and *Jennifer Herndon*, by appointment of the Court, 541 U. S. 1040.*

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*A brief of *amici curiae* urging reversal was filed for the State of Alabama et al. by *Troy King*, Attorney General of Alabama, *Kevin C. Newsom*, Solicitor General, and *A. Vernon Barnett IV*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *M. Jane Brady* of Delaware, *W. A. Drew Edmondson* of Oklahoma, *Greg*

JUSTICE KENNEDY delivered the opinion of the Court.

This case requires us to address, for the second time in a decade and a half, whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older

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Abbott of Texas, *Mark L. Shurtleff* of Utah, and *Jerry W. Kilgore* of Virginia.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eliot Spitzer*, Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Daniel Smirlock*, Deputy Solicitor General, and *Jean Lin* and *Julie Loughran*, Assistant Solicitors General, and by the Attorneys General for their respective States as follows: *Thomas J. Miller* of Iowa, *Phill Kline* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Patricia A. Madrid* of New Mexico, *Hardy Myers* of Oregon, and *Darrell V. McGraw, Jr.*, of West Virginia; for the American Bar Association by *Dennis W. Archer, Amy R. Sabrin*, and *Matthew W. S. Estes;* for the American Psychological Association et al. by *Drew S. Days III, Beth S. Brinkmann, Sherri N. Blount, Timothy C. Lambert, Nathalie F. P. Gilfoyle*, and *Lindsay Childress-Beatty;* for the Coalition for Juvenile Justice by *Joseph D. Tydings;* for the Constitution Project by *Laurie Webb Daniel* and *Virginia E. Sloan;* for the Human Rights Committee of the Bar of England and Wales et al. by *Michael Bochenek, Audrey J. Anderson, William H. Johnson*, and *Thomas H. Speedy Rice;* for the Juvenile Law Center et al. by *Marsha L. Levick, Lourdes M. Rosado, Steven A. Drizin, Barbara Bennett Woodhouse, Michael C. Small*, and *Jeffrey P. Kehne;* for the Missouri Ban Youth Executions Coalition by *Joseph W. Luby;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Theodore M. Shaw, Norman J. Chachkin, Miriam Gohara, Christina A. Swarns, Steven R. Shapiro*, and *Diann Y. Rust-Tierney;* for the United States Conference of Catholic Bishops et al. by *Mark E. Chopko* and *Michael F. Moses;* and for Former U. S. Diplomats Morton Abramowitz et al. by *Harold Hongju Koh, Donald Francis Donovan*, and *Stephen B. Bright.*

Briefs of *amici curiae* were filed for the European Union et al. by *Richard J. Wilson;* for the American Medical Association et al. by *Joseph T. McLaughlin, E. Joshua Rosenkranz*, and *Stephane M. Clare;* for the Justice for All Alliance by *Dan Cutrer;* for Murder Victims' Families for Reconciliation by *Kate Lowenstein;* for the National Legal Aid and Defender Association by *Michael Mello;* and for President James Earl Carter, Jr., et al. by *Thomas F. Geraghty.*

than 15 but younger than 18 when he committed a capital crime. In *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. We reconsider the question.

I

At the age of 17, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after he had turned 18, he was tried and sentenced to death. There is little doubt that Simmons was the instigator of the crime. Before its commission Simmons said he wanted to murder someone. In chilling, callous terms he talked about his plan, discussing it for the most part with two friends, Charles Benjamin and John Tessmer, then aged 15 and 16 respectively. Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could "get away with it" because they were minors.

The three met at about 2 a.m. on the night of the murder, but Tessmer left before the other two set out. (The State later charged Tessmer with conspiracy, but dropped the charge in exchange for his testimony against Simmons.) Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a rail-

road trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

By the afternoon of September 9, Steven Crook had returned home from an overnight trip, found his bedroom in disarray, and reported his wife missing. On the same afternoon fishermen recovered the victim's body from the river. Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman "because the bitch seen my face."

The next day, after receiving information of Simmons' involvement, police arrested him at his high school and took him to the police station in Fenton, Missouri. They read him his *Miranda* rights. Simmons waived his right to an attorney and agreed to answer questions. After less than two hours of interrogation, Simmons confessed to the murder and agreed to perform a videotaped reenactment at the crime scene.

The State charged Simmons with burglary, kidnaping, stealing, and murder in the first degree. As Simmons was 17 at the time of the crime, he was outside the criminal jurisdiction of Missouri's juvenile court system. See Mo. Rev. Stat. §§211.021 (2000) and 211.031 (Supp. 2003). He was tried as an adult. At trial the State introduced Simmons' confession and the videotaped reenactment of the crime, along with testimony that Simmons discussed the crime in advance and bragged about it later. The defense called no witnesses in the guilt phase. The jury having returned a verdict of murder, the trial proceeded to the penalty phase.

The State sought the death penalty. As aggravating factors, the State submitted that the murder was committed for the purpose of receiving money; was committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman.

The State called Shirley Crook's husband, daughter, and two sisters, who presented moving evidence of the devastation her death had brought to their lives.

In mitigation Simmons' attorneys first called an officer of the Missouri juvenile justice system, who testified that Simmons had no prior convictions and that no previous charges had been filed against him. Simmons' mother, father, two younger half brothers, a neighbor, and a friend took the stand to tell the jurors of the close relationships they had formed with Simmons and to plead for mercy on his behalf. Simmons' mother, in particular, testified to the responsibility Simmons demonstrated in taking care of his two younger half brothers and of his grandmother and to his capacity to show love for them.

During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough." Defense counsel argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury recommended the death penalty after finding the State had proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty.

Simmons obtained new counsel, who moved in the trial court to set aside the conviction and sentence. One argument was that Simmons had received ineffective assistance at trial. To support this contention, the new counsel called

as witnesses Simmons' trial attorney, Simmons' friends and neighbors, and clinical psychologists who had evaluated him.

Part of the submission was that Simmons was "very immature," "very impulsive," and "very susceptible to being manipulated or influenced." The experts testified about Simmons' background including a difficult home environment and dramatic changes in behavior, accompanied by poor school performance in adolescence. Simmons was absent from home for long periods, spending time using alcohol and drugs with other teenagers or young adults. The contention by Simmons' postconviction counsel was that these matters should have been established in the sentencing proceeding.

The trial court found no constitutional violation by reason of ineffective assistance of counsel and denied the motion for postconviction relief. In a consolidated appeal from Simmons' conviction and sentence, and from the denial of postconviction relief, the Missouri Supreme Court affirmed. *State* v. *Simmons*, 944 S. W. 2d 165, 169 (en banc), cert. denied, 522 U. S. 953 (1997). The federal courts denied Simmons' petition for a writ of habeas corpus. *Simmons* v. *Bowersox*, 235 F. 3d 1124, 1127 (CA8), cert. denied, 534 U. S. 924 (2001).

After these proceedings in Simmons' case had run their course, this Court held that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person. *Atkins* v. *Virginia*, 536 U. S. 304 (2002). Simmons filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.

The Missouri Supreme Court agreed. *State ex rel. Simmons* v. *Roper*, 112 S. W. 3d 397 (2003) (en banc). It held that since *Stanford*,

> "a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juve-

> niles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade." 112 S. W. 3d, at 399.

On this reasoning it set aside Simmons' death sentence and resentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor." *Id.*, at 413.

We granted certiorari, 540 U. S. 1160 (2004), and now affirm.

II

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Furman* v. *Georgia*, 408 U. S. 238, 239 (1972) *(per curiam)*; *Robinson* v. *California*, 370 U. S. 660, 666–667 (1962); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 463 (1947) (plurality opinion). As the Court explained in *Atkins*, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" 536 U. S., at 311 (quoting *Weems* v. *United States*, 217 U. S. 349, 367 (1910)). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this

framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop* v. *Dulles*, 356 U. S. 86, 100–101 (1958) (plurality opinion).

In *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988), a plurality of the Court determined that our standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime. *Id.*, at 818–838 (opinion of STEVENS, J., joined by Brennan, Marshall, and Blackmun, JJ.). The plurality opinion explained that no death penalty State that had given express consideration to a minimum age for the death penalty had set the age lower than 16. *Id.*, at 826–829. The plurality also observed that "[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community." *Id.*, at 830. The opinion further noted that juries imposed the death penalty on offenders under 16 with exceeding rarity; the last execution of an offender for a crime committed under the age of 16 had been carried out in 1948, 40 years prior. *Id.*, at 832–833.

Bringing its independent judgment to bear on the permissibility of the death penalty for a 15-year-old offender, the *Thompson* plurality stressed that "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.*, at 835. According to the plurality, the lesser culpability of offenders under 16 made the death penalty inappropriate as a form of retribution, while the low likelihood that offenders under 16 engaged in "the kind of cost-benefit analysis that

attaches any weight to the possibility of execution" made the death penalty ineffective as a means of deterrence. *Id.*, at 836–838. With JUSTICE O'CONNOR concurring in the judgment on narrower grounds, *id.*, at 848–859, the Court set aside the death sentence that had been imposed on the 15-year-old offender.

The next year, in *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), the Court, over a dissenting opinion joined by four Justices, referred to contemporary standards of decency in this country and concluded the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18. The Court noted that 22 of the 37 death penalty States permitted the death penalty for 16-year-old offenders, and, among these 37 States, 25 permitted it for 17-year-old offenders. These numbers, in the Court's view, indicated there was no national consensus "sufficient to label a particular punishment cruel and unusual." *Id.*, at 370–371. A plurality of the Court also "emphatically reject[ed]" the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty. *Id.*, at 377–378 (opinion of SCALIA, J., joined by REHNQUIST, C. J., and White and KENNEDY, JJ.); see also *id.*, at 382 (O'CONNOR, J., concurring in part and concurring in judgment) (criticizing the plurality's refusal "to judge whether the ' "nexus between the punishment imposed and the defendant's blameworthiness" ' is proportional").

The same day the Court decided *Stanford*, it held that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded. *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). In reaching this conclusion it stressed that only two States had enacted laws banning the imposition of the death penalty on a mentally retarded person convicted of a capital offense. *Id.*, at 334. According to the Court, "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely,

[did] not provide sufficient evidence at present of a national consensus." *Ibid.*

Three Terms ago the subject was reconsidered in *Atkins*. We held that standards of decency have evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment. The Court noted objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions of the mentally retarded. When *Atkins* was decided only a minority of States permitted the practice, and even in those States it was rare. 536 U. S., at 314–315. On the basis of these indicia the Court determined that executing mentally retarded offenders "has become truly unusual, and it is fair to say that a national consensus has developed against it." *Id.*, at 316.

The inquiry into our society's evolving standards of decency did not end there. The *Atkins* Court neither repeated nor relied upon the statement in *Stanford* that the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions predating *Stanford*, that "'the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" 536 U. S., at 312 (quoting *Coker* v. *Georgia*, 433 U. S. 584, 597 (1977) (plurality opinion)). Mental retardation, the Court said, diminishes personal culpability even if the offender can distinguish right from wrong. 536 U. S., at 318. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect. *Id.*, at 319–320. Based on these considerations and on the finding of national consensus against executing the mentally retarded, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offend-

ers, and that the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.*, at 321 (quoting *Ford* v. *Wainwright*, 477 U. S. 399, 405 (1986)).

Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*. The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.

III

A

The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. 536 U. S., at 313–315. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. See Appendix A, *infra*. *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. Since *Penry*, only five States had executed offenders known to have an IQ under 70. 536 U. S., at 316. In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as ju-

veniles. In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia. See V. Streib, The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973–December 31, 2004, No. 76, p. 4 (2005), available at http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf (last updated Jan. 31, 2005) (as visited Feb. 25, 2005, and available in Clerk of Court's case file). In December 2003 the Governor of Kentucky decided to spare the life of Kevin Stanford, and commuted his sentence to one of life imprisonment without parole, with the declaration that "'[w]e ought not be executing people who, legally, were children.'" Lexington Herald Leader, Dec. 9, 2003, p. B3, 2003 WL 65043346. By this act the Governor ensured Kentucky would not add itself to the list of States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford* v. *Kentucky*.

There is, to be sure, at least one difference between the evidence of consensus in *Atkins* and in this case. Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded. Sixteen States that permitted the execution of the mentally retarded at the time of *Penry* had prohibited the practice by the time we heard *Atkins*. By contrast, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower. Five States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years—four through legislative enactments and one through judicial decision. Streib, *supra*, at 5, 7; *State* v. *Furman*, 122 Wash. 2d 440, 858 P. 2d 1092 (1993) (en banc).

Though less dramatic than the change from *Penry* to *Atkins* ("telling," to borrow the word *Atkins* used to describe this difference, 536 U. S., at 315, n. 18), we still consider the change from *Stanford* to this case to be significant. As noted in *Atkins*, with respect to the States that had aban-

doned the death penalty for the mentally retarded since *Penry*, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." 536 U. S., at 315. In particular we found it significant that, in the wake of *Penry*, no State that had already prohibited the execution of the mentally retarded had passed legislation to reinstate the penalty. 536 U. S., at 315–316. The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry;* yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation, *Atkins*, *supra*, at 315, and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects, see H. Snyder & M. Sickmund, National Center for Juvenile Justice, Juvenile Offenders and Victims: 1999 National Report 89, 133 (Sept. 1999); Scott & Grisso, The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88 J. Crim. L. & C. 137, 148 (1997). Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change.

The slower pace of abolition of the juvenile death penalty over the past 15 years, moreover, may have a simple explanation. When we heard *Penry*, only two death penalty States had already prohibited the execution of the mentally retarded. When we heard *Stanford*, by contrast, 12 death penalty States had already prohibited the execution of any juvenile under 18, and 15 had prohibited the execution of any juvenile under 17. If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age

gained wide recognition earlier than the impropriety of executing the mentally retarded. In the words of the Missouri Supreme Court: "It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution of juveniles now that the execution of the mentally retarded has been barred." 112 S. W. 3d, at 408, n. 10.

Petitioner cannot show national consensus in favor of capital punishment for juveniles but still resists the conclusion that any consensus exists against it. Petitioner supports this position with, in particular, the observation that when the Senate ratified the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U. N. T. S. 171 (entered into force Mar. 23, 1976), it did so subject to the President's proposed reservation regarding Article 6(5) of that treaty, which prohibits capital punishment for juveniles. Brief for Petitioner 27. This reservation at best provides only faint support for petitioner's argument. First, the reservation was passed in 1992; since then, five States have abandoned capital punishment for juveniles. Second, Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles. See 18 U. S. C. § 3591. The reservation to Article 6(5) of the ICCPR provides minimal evidence that there is not now a national consensus against juvenile executions.

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal." 536 U. S., at 316.

B

A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.

Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. *Thompson*, 487 U. S., at 856 (O'CONNOR, J., concurring in judgment). Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Atkins*, *supra*, at 319. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. *Godfrey* v. *Georgia*, 446 U. S. 420, 428–429 (1980) (plurality opinion). In any capital case a defendant has wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982); see also *Johnson* v. *Texas*, 509 U. S. 350, 359–362 (1993) (summarizing the Court's jurisprudence after *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, with respect to a sentencer's consideration of aggravating and mitigating factors). There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. *Coker* v. *Georgia*, 433 U. S. 584 (1977) (rape of an adult woman); *Enmund* v. *Florida*, 458 U. S. 782 (1982) (felony murder where defendant did not kill, attempt to kill, or intend to kill). The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. *Thompson* v. *Oklahoma*, *supra*; *Ford* v. *Wainwright*, 477 U. S. 399 (1986); *Atkins*, *supra*. These rules vindicate the underlying princi-

ple that the death penalty is reserved for a narrow category of crimes and offenders.

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson*, *supra*, at 367; see also *Eddings*, *supra*, at 115–116 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B–D, *infra*.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings*, *supra*, at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson, supra,* at 835 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford,* 492 U. S., at 395 (Brennan, J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson, supra,* at 368; see also Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

In *Thompson,* a plurality of the Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment prohibited the imposition of the death penalty on juveniles

below that age. 487 U. S., at 833–838. We conclude the same reasoning applies to all juvenile offenders under 18.

Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: "'retribution and deterrence of capital crimes by prospective offenders.'" *Atkins*, 536 U. S., at 319 (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.)). As for retribution, we remarked in *Atkins* that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." 536 U. S., at 319. The same conclusions follow from the lesser culpability of the juvenile offender. Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for petitioner acknowledged at oral argument. Tr. of Oral Arg. 48. In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes, see *Harmelin* v. *Michigan*, 501 U. S. 957, 998–999 (1991) (KENNEDY, J., concurring in part and concurring in judgment). Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. In particular, as the plurality observed in

Thompson, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." 487 U. S., at 837. To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

In concluding that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders, we cannot deny or overlook the brutal crimes too many juvenile offenders have committed. See Brief for Alabama et al. as *Amici Curiae*. Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death. Indeed, this possibility is the linchpin of one contention pressed by petitioner and his *amici*. They assert that even assuming the truth of the observations we have made about juveniles' diminished culpability in general, jurors nonetheless should be allowed to consider mitigating arguments related to youth on a case-by-case basis, and in some cases to impose the death penalty if justified. A central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender. The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case. Given this Court's own insistence on individualized consideration, petitioner maintains that it is both arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on any offender under 18 years of age.

We disagree. The differences between juvenile and adult offenders are too marked and well understood to risk allow-

ing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating. *Supra*, at 558. While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns.

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. See Steinberg & Scott 1014–1016. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701–706 (4th ed. text rev. 2000); see also Steinberg & Scott 1015. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some

of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

These considerations mean *Stanford* v. *Kentucky* should be deemed no longer controlling on this issue. To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, 492 U. S., at 370–371, it suffices to note that those indicia have changed. *Supra*, at 564–567. It should be observed, furthermore, that the *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty, 492 U. S., at 370, n. 2; a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles. Last, to the extent *Stanford* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, *id.*, at 377–378 (plurality opinion), it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions, *Thompson*, 487 U. S., at 833–

838 (plurality opinion); *Enmund*, 458 U. S., at 797; *Coker*, 433 U. S., at 597 (plurality opinion). It is also inconsistent with the premises of our recent decision in *Atkins*. 536 U. S., at 312–313, 317–321.

In holding that the death penalty cannot be imposed upon juvenile offenders, we take into account the circumstance that some States have relied on *Stanford* in seeking the death penalty against juvenile offenders. This consideration, however, does not outweigh our conclusion that *Stanford* should no longer control in those few pending cases or in those yet to arise.

IV

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U. S., at 102–103 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"); see also *Atkins*, *supra*, at 317, n. 21 (recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *Thompson*, *supra*, at 830–831, and n. 31 (plurality opinion) (noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international commu-

nity in determining whether a punishment is cruel and unusual"); *Enmund, supra,* at 796–797, n. 22 (observing that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *Coker, supra,* at 596, n. 10 (plurality opinion) ("It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue").

As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U. N. T. S. 3, 28 I. L. M. 1448, 1468–1470 (entered into force Sept. 2, 1990); Brief for Respondent 48; Brief for European Union et al. as *Amici Curiae* 12–13; Brief for President James Earl Carter, Jr., et al. as *Amici Curiae* 9; Brief for Former U. S. Diplomats Morton Abramowitz et al. as *Amici Curiae* 7; Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 13–14. No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. See ICCPR, Art. 6(5), 999 U. N. T. S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5), as noted, *supra,* at 567); American Convention on Human Rights: Pact of San José, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U. N. T. S. 146 (entered into force July 19, 1978) (same); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/ 24.9/49 (1990) (entered into force Nov. 29, 1999) (same).

Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. Brief for Respondent 49–50. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: "[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 W. & M., ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1770); see also *Trop, supra*, at 100 (plurality opinion). As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. In 1930 an official committee recommended that the minimum age for execution be raised to 21. House of Commons Report from the Select Committee on Capital Punishment (1930), 193, p. 44. Parliament then enacted the Children and Young Person's Act of 1933, 23 Geo. 5, ch. 12, which prevented execution of those aged 18 at the date of the sentence. And in 1948, Parliament enacted the Criminal Justice Act, 11 & 12 Geo. 6, ch. 58, prohibiting the execution of any person under 18 at the time of the offense. In the 56 years that have passed

since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established.

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 10–11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. See The Federalist No. 49, p. 314 (C. Rossiter ed. 1961). The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

* * *

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment

of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simmons is affirmed.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT

I. STATES THAT PERMIT THE IMPOSITION OF THE DEATH PENALTY ON JUVENILES

Alabama	Ala. Code § 13A–6–2(c) (West 2004) (no express minimum age)
Arizona	Ariz. Rev. Stat. Ann. § 13–703(A) (West Supp. 2004) (same)
Arkansas	Ark. Code Ann. § 5–4–615 (Michie 1997) (same)
Delaware	Del. Code Ann., Tit. 11 (Lexis 1995) (same)
Florida	Fla. Stat. § 985.225(1) (2003) (same)
Georgia	Ga. Code Ann. § 17–9–3 (Lexis 2004) (same)
Idaho	Idaho Code § 18–4004 (Michie 2004) (same)
Kentucky	Ky. Rev. Stat. Ann. § 640.040(1) (Lexis 1999) (minimum age of 16)
Louisiana	La. Stat. Ann. § 14:30(C) (West Supp. 2005) (no express minimum age)
Mississippi	Miss. Code Ann. § 97–3–21 (Lexis 2000) (same)
Missouri	Mo. Rev. Stat. Ann. § 565.020 (2000) (minimum age of 16)
Nevada	Nev. Rev. Stat. § 176.025 (2003) (minimum age of 16)
New Hampshire	N. H. Rev. Stat. Ann. § 630:1(V) (West 1996) (minimum age of 17)
North Carolina	N. C. Gen. Stat. § 14–17 (Lexis 2003) (minimum age of 17, except that those under 17 who commit murder while serving a prison sentence for a previous murder may receive the death penalty)
Oklahoma	Okla. Stat. Ann., Tit. 21, § 701.10 (West 2002) (no express minimum age)
Pennsylvania	18 Pa. Cons. Stat. § 1102 (2002) (same)
South Carolina	S. C. Code Ann. § 16–3–20 (West Supp. 2004 and main ed.) (same)
Texas	Tex. Penal Code Ann. § 8.07(c) (West Supp. 2004–2005) (minimum age of 17)
Utah	Utah Code Ann. § 76–3–206(1) (Lexis 2003) (no express minimum age)

Appendix A to opinion of the Court

Virginia	Va. Code Ann. § 18.2–10(a) (Lexis 2004) (minimum age of 16)

II. STATES THAT RETAIN THE DEATH PENALTY, BUT SET THE MINIMUM AGE AT 18

California	Cal. Penal Code Ann. § 190.5 (West 1999)
Colorado	Colo. Rev. Stat. § 18–1.4–102(1)(a) (Lexis 2004)
Connecticut	Conn. Gen. Stat. § 53a–46a(h) (2005)
Illinois	Ill. Comp. Stat., ch. 720, § 5/9–1(b) (West Supp. 2003)
Indiana	Ind. Code Ann. § 35–50–2–3 (2004)
Kansas	Kan. Stat. Ann. § 21–4622 (1995)
Maryland	Md. Crim. Law Code Ann. § 2–202(b)(2)(i) (Lexis 2002)
Montana	Mont. Code Ann. § 45–5–102 (2003)
Nebraska	Neb. Rev. Stat. § 28–105.01(1) (Supp. 2004)
New Jersey	N. J. Stat. Ann. § 2C:11–3(g) (West Supp. 2003)
New Mexico	N. M. Stat. Ann. § 31–18–14(A) (2000)
New York	N. Y. Penal Law Ann. § 125.27 (West 2004)
Ohio	Ohio Rev. Code Ann. § 2929.02(A) (Lexis 2003)
Oregon	Ore. Rev. Stat. §§ 161.620, 137.707(2) (2003)
South Dakota	S. D. Codified Laws § 23A–27A–42 (West 2004)
Tennessee	Tenn. Code Ann. § 37–1–134(a)(1) (1996)
Washington	Minimum age of 18 established by judicial decision. *State* v. *Furman*, 122 Wash. 2d 440, 858 P. 2d 1092 (1993)
Wyoming	Wyo. Stat. § 6–2–101(b) (Lexis Supp. 2004)

* * *

During the past year, decisions by the highest courts of Kansas and New York invalidated provisions in those States' death penalty statutes. *State* v. *Marsh*, 278 Kan. 520, 102 P. 3d 445 (2004) (invalidating provision that required imposition of the death penalty if aggravating and mitigating circumstances were found to be in equal balance); *People* v. *LaValle*, 3 N. Y. 3d 88, 817 N. E. 2d 341 (2004) (invalidating mandatory requirement to instruct the jury that, in the case of jury deadlock as to the appropriate sentence in a capital case, the defendant would receive a sentence of life imprisonment with parole eligibility after serving a minimum of 20 to 25 years). Due to these decisions, it would appear that in these States the death penalty remains on the books, but that as a practical matter it might not be imposed on anyone until there is a change of course in these decisions, or until the respective state legislatures remedy the problems the courts have identified. *Marsh*, *supra*, at 524–526, 544–546, 102 P. 3d, at 452, 464; *LaValle*, *supra*, at 99, 817 N. E. 2d, at 344.

Appendix B to opinion of the Court

III. STATES WITHOUT THE DEATH PENALTY

Alaska
Hawaii
Iowa
Maine
Massachusetts
Michigan
Minnesota
North Dakota
Rhode Island
Vermont
West Virginia
Wisconsin

APPENDIX B TO OPINION OF THE COURT

STATE STATUTES ESTABLISHING A MINIMUM AGE TO VOTE

STATE	AGE	STATUTE
Alabama	18	Ala. Const., Amdt. No. 579
Alaska	18	Alaska Const., Art. V, § 1; Alaska Stat. § 15–05.010 (Lexis 2004)
Arizona	18	Ariz. Const., Art. VII, § 2; Ariz. Rev. Stat. § 16–101 (West 2001)
Arkansas	18	Ark. Code Ann. § 9–25–101 (Lexis 2002)
California	18	Cal. Const., Art. 2, § 2
Colorado	18	Colo. Rev. Stat. § 1–2–101 (Lexis 2004)
Connecticut	18	Conn. Const., Art. 6, § 1; Conn. Gen. Stat. § 9–12 (2005)
Delaware	18	Del. Code Ann., Tit. 15, § 1701 (Michie Supp. 2004)
District of Columbia	18	D. C. Code § 1–1001.02(2)(B) (West Supp. 2004)
Florida	18	Fla. Stat. ch. 97.041 (2003)
Georgia	18	Ga. Const., Art. 2, § 1, ¶ 2; Ga. Code Ann. § 21–2–216 (Lexis 2003)
Hawaii		Haw. Const., Art. II, § 1; Haw. Rev. Stat. § 11–12 (1995)
Idaho	18	Idaho Code § 34–402 (Michie 2001)
Illinois	18	Ill. Const., Art. III, § 1; Ill. Comp. Stat., ch. 10, § 5/3–1 (West 2002)
Indiana	18	Ind. Code Ann. § 3–7–13–1 (2004)
Iowa	18	Iowa Code § 48A.5 (2003)

Appendix B to opinion of the Court

Kansas	18	Kan. Const., Art. 5, § 1
Kentucky	18	Ky. Const. § 145
Louisiana	18	La. Const., Art. I, § 10; La. Rev. Stat. Ann. § 18:101 (West 2004)
Maine	18	Me. Const., Art. II, § 1 (West Supp. 2004); Me. Rev. Stat. Ann., Tit. 21–A, §§ 111, 111–A (West 1993 and Supp. 2004)
Maryland	18	Md. Elec. Law Code Ann. § 3–102 (Lexis 2002)
Massachusetts	18	Mass. Gen. Laws Ann., ch. 51, § 1 (West Supp. 2005)
Michigan	18	Mich. Comp. Laws Ann. § 168.492 (West 1989)
Minnesota	18	Minn. Stat. § 201.014(1)(a) (2004)
Mississippi	18	Miss. Const., Art. 12, § 241
Missouri	18	Mo. Const., Art. VIII, § 2
Montana	18	Mont. Const., Art. IV, § 2; Mont. Code Ann. § 13–1–111 (2003)
Nebraska	18	Neb. Const., Art. VI, § 1; Neb. Rev. Stat. § 32–110 (2004)
Nevada	18	Nev. Rev. Stat. § 293.485 (2003)
New Hampshire	18	N. H. Const., Pt. 1, Art. 11
New Jersey	18	N. J. Const., Art. II, § 1, ¶ 3
New Mexico	18	[no provision other than U. S. Const., Amdt. XXVI]
New York	18	N. Y. Elec. Law Ann. § 5–102 (West 1998)
North Carolina	18	N. C. Gen. Stat. Ann. § 163–55 (Lexis 2003)
North Dakota	18	N. D. Const., Art. II, § 1
Ohio	18	Ohio Const., Art. V, § 1; Ohio Rev. Code Ann. § 3503.01 (Anderson 1996)
Oklahoma	18	Okla. Const., Art. III, § 1
Oregon	18	Ore. Const., Art. II, § 2
Pennsylvania	18	25 Pa. Cons. Stat. Ann. § 2811 (1994)
Rhode Island	18	R. I. Gen. Laws § 17–1–3 (Lexis 2003)
South Carolina	18	S. C. Code Ann. § 7–5–610 (West Supp. 2004)
South Dakota	18	S. D. Const., Art. VII, § 2; S. D. Codified Laws Ann. § 12–3–1 (West 2004)
Tennessee	18	Tenn. Code Ann. § 2–2–102 (2003)
Texas	18	Tex. Elec. Code Ann. § 11.002 (West 2003)
Utah	18	Utah Const., Art. IV, § 2; Utah Code Ann. § 20A–2–101 (Lexis 2003)
Vermont	18	Vt. Stat. Ann., Tit. 17, § 2121 (Lexis 2002)

Virginia	18	Va. Const., Art. II, § 1
Washington	18	Wash. Const., Art. VI, § 1
West Virginia	18	W. Va. Code § 3–1–3 (Lexis 2002)
Wisconsin	18	Wis. Const., Art. III, § 1; Wis. Stat. § 6.02 (West 2004)
Wyoming	18	Wyo. Stat. Ann. §§ 22–1–102, 22–3–102 (Lexis Supp. 2004)

* * *

The Twenty-Sixth Amendment to the Constitution of the United States provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

APPENDIX C TO OPINION OF THE COURT

STATE STATUTES ESTABLISHING A MINIMUM AGE FOR JURY SERVICE

STATE	AGE	STATUTE
Alabama	19	Ala. Code § 12–16–60(a)(1) (West 1995)
Alaska	18	Alaska Stat. § 09.20.010(a)(3) (Lexis 2004)
Arizona	18	Ariz. Rev. Stat. § 21–301(D) (West 2002)
Arkansas	18	Ark. Code Ann. §§ 16–31–101, 16–32–302 (Lexis Supp. 2003)
California	18	Cal. Civ. Proc. § 203(a)(2) (West Supp. 2005)
Colorado	18	Colo. Rev. Stat. § 13–71–105(2)(a) (Lexis 2004)
Connecticut	18	Conn. Gen. Stat. § 51–217(a) (2005)
Delaware	18	Del. Code Ann., Tit. 10, § 4509(b)(2) (Michie 1999)
District of Columbia	18	D. C. Code § 11–1906(b)(1)(C) (West 2001)
Florida	18	Fla. Stat. § 40.01 (2003)
Georgia	18	Ga. Code Ann. §§ 15–12–60, 15–12–163 (Lexis 2001)
Hawaii	18	Haw. Rev. Stat. § 612–4(a)(1) (Supp. 2004)
Idaho	18	Idaho Code § 2–209(2)(a) (Michie 2004)
Illinois	18	Ill. Comp. Stat., ch. 705, § 305/2 (West 2002)
Indiana	18	Ind. Code § 33–28–4–8 (2004)
Iowa	18	Iowa Code § 607A.4(1)(*a*) (2003)
Kansas	18	Kan. Stat. Ann. § 43–156 (2000) (jurors must be qualified to be electors); Kan. Const., Art. 5, § 1 (person must be 18 to be qualified elector)

Appendix C to opinion of the Court

Kentucky	18	Ky. Rev. Stat. Ann. §29A.080(2)(a) (Lexis Supp. 2004)
Louisiana	18	La. Code Crim. Proc. Ann., Art. 401(A)(2) (West 2003)
Maine	18	Me. Rev. Stat. Ann., Tit. 14, §1211 (West 1980)
Maryland	18	Md. Cts. & Jud. Proc. Code Ann. §8–104 (Lexis 2002)
Massachusetts	18	Mass. Gen. Laws Ann., ch. 234, §1 (West 2000) (jurors must be qualified to vote); ch. 51, §1 (West Supp. 2005) (person must be 18 to vote)
Michigan	18	Mich. Comp. Laws Ann. §600.1307a(1)(a) (West Supp. 2004)
Minnesota	18	Minn. Dist. Ct. Rule 808(b)(2) (2004)
Mississippi	21	Miss. Code Ann. §13–5–1 (Lexis 2002)
Missouri	21	Mo. Rev. Stat. §494.425(1) (2000)
Montana	18	Mont. Code Ann. §3–15–301 (2003)
Nebraska	19	Neb. Rev. Stat. §25–1601 (Supp. 2004)
Nevada	18	Nev. Rev. Stat. §6.010 (2003) (juror must be qualified elector); §293.485 (person must be 18 to vote)
New Hampshire	18	N. H. Rev. Stat. Ann. §500–A:7–a(I) (Lexis Supp. 2004)
New Jersey	18	N. J. Stat. Ann. §2B:20–1(a) (West 2004 Pamphlet)
New Mexico	18	N. M. Stat. Ann. §38–5–1 (1998)
New York	18	N. Y. Jud. Law Ann. §510(2) (West 2003)
North Carolina	18	N. C. Gen. Stat. Ann. §9–3 (Lexis 2003)
North Dakota	18	N. D. Cent. Code §27–09.1–08(2)(b) (Lexis Supp. 2003)
Ohio	18	Ohio Rev. Code Ann. §2313.42 (Anderson 2001)
Oklahoma	18	Okla. Stat. Ann., Tit. 38, §28 (West Supp. 2005)
Rhode Island	18	R. I. Gen. Laws §9–9–1.1(a)(2) (Lexis Supp. 2005)
South Carolina	18	S. C. Code Ann. §14–7–130 (West Supp. 2004)
South Dakota	18	S. D. Codified Laws §16–13–10 (2004)
Tennessee	18	Tenn. Code Ann. §22–1–101 (1994)
Texas	18	Tex. Govt. Code Ann. §62.102(1) (West 1998)
Utah	18	Utah Code Ann. §78–46–7(1)(b) (Lexis 2002)
Vermont	18	Vt. Stat. Ann., Tit. 4, §962(a)(1) (Lexis 1999) (jurors must have attained age of majority); Tit. 1, §173 (Lexis 2003) (age of majority is 18)

Virginia	18	Va. Code Ann. §8.01–337 (Lexis 2000)
Washington	18	Wash. Rev. Code Ann. §2.36.070 (West 2004)
West Virginia	18	W. Va. Code §52–1–8(b)(1) (Lexis 2000)
Wisconsin	18	Wis. Stat. §756.02 (West 2001)
Wyoming	18	Wyo. Stat. Ann. §1–11–101 (Lexis 2003) (jurors must be adults); §14–1–101 (person becomes an adult at 18)

APPENDIX D TO OPINION OF THE COURT

STATE STATUTES ESTABLISHING A MINIMUM AGE FOR MARRIAGE WITHOUT PARENTAL OR JUDICIAL CONSENT

STATE	AGE	STATUTE
Alabama	18	Ala. Code §30–1–5 (West Supp. 2004)
Alaska	18	Alaska Stat. §§25.05.011, 25.05.171 (Lexis 2004)
Arizona	18	Ariz. Rev. Stat. Ann. §25–102 (West Supp. 2004)
Arkansas	18	Ark. Code Ann. §§9–11–102, 9–11–208 (Lexis 2002)
California	18	Cal. Fam. Code Ann. §301 (West 2004)
Colorado	18	Colo. Rev. Stat. Ann. §14–2–106 (Lexis 2004)
Connecticut	18	Conn. Gen. Stat. §46b–30 (2005)
Delaware	18	Del. Code Ann., Tit. 13, §123 (Lexis 1999)
District of Columbia	18	D. C. Code §46–411 (West 2001)
Florida	18	Fla. Stat. §§741.04, 741.0405 (2003)
Georgia	16	Ga. Code Ann. §§19–3–2, 19–3–37 (Lexis 2004) (those under 18 must obtain parental consent unless female applicant is pregnant or both applicants are parents of a living child, in which case minimum age to marry without consent is 16)
Hawaii	18	Haw. Rev. Stat. §572–2 (1993)
Idaho	18	Idaho Code §32–202 (Michie 1996)
Illinois	18	Ill. Comp. Stat., ch. 750, §5/203 (West 2002)
Indiana	18	Ind. Code Ann. §§31–11–1–4, 31–11–1–5, 31–11–2–1, 31–11–2–3 (2004)
Iowa	18	Iowa Code §595.2 (2003)
Kansas	18	Kan. Stat. Ann. §23–106 (Supp. 2003)
Kentucky	18	Ky. Rev. Stat. Ann. §§402.020, 402.210 (Lexis 1999)
Louisiana	18	La. Children's Code Ann., Arts. 1545, 1547 (West 2004) (minors may not marry without

		consent); La. Civ. Code Ann., Art. 29 (West 1999) (age of majority is 18)
Maine	18	Me. Rev. Stat. Ann., Tit. 19–A, § 652 (West 1998 and Supp. 2004)
Maryland	16	Md. Fam. Law Code Ann. § 2–301 (Lexis 2004) (those under 18 must obtain parental consent unless female applicant can present proof of pregnancy or a child, in which case minimum age to marry without consent is 16)
Massachusetts	18	Mass. Gen. Laws Ann., ch. 207, §§ 7, 24, 25 (West 1998)
Michigan	18	Mich. Comp. Laws Ann. § 551.103 (West 2005)
Minnesota	18	Minn. Stat. § 517.02 (2004)
Mississippi	15/17	Miss. Code Ann. § 93–1–5 (Lexis 2004) (female applicants must be 15; male applicants must be 17)
Missouri	18	Mo. Rev. Stat. § 451.090 (2000)
Montana	18	Mont. Code Ann. §§ 40–1–202, 40–1–213 (2003)
Nebraska	19	Neb. Rev. Stat. § 42–105 (2004) (minors must have parental consent to marry); § 43–2101 (defining "minor" as a person under 19)
Nevada	18	Nev. Rev. Stat. § 122.020 (2003)
New Hampshire	18	N. H. Rev. Stat. Ann. § 457:5 (West 1992)
New Jersey	18	N. J. Stat. Ann. § 37:1–6 (West 2002)
New Mexico	18	N. M. Stat. Ann. § 40–1–6 (1999)
New York	18	N. Y. Dom. Rel. Law Ann. § 15 (West Supp. 2005)
North Carolina	18	N. C. Gen. Stat. Ann. § 51–2 (Lexis 2003)
North Dakota	18	N. D. Cent. Code § 14–03–02 (Lexis 2004)
Ohio	18	Ohio Rev. Code Ann. § 3101.01 (2003)
Oklahoma	18	Okla. Stat. Ann., Tit. 43, § 3 (West Supp. 2005)
Oregon	18	Ore. Rev. Stat. § 106.060 (2003)
Pennsylvania	18	23 Pa. Cons. Stat. § 1304 (1997)
Rhode Island	18	R. I. Gen. Laws § 15–2–11 (Supp. 2004)
South Carolina	18	S. C. Code Ann. § 20–1–250 (West Supp. 2004)
South Dakota	18	S. D. Codified Laws § 25–1–9 (West 2004)
Tennessee	18	Tenn. Code Ann. § 36–3–106 (1996)
Texas	18	Tex. Fam. Code Ann. §§ 2.101–2.103 (West 1998)
Utah	18	Utah Code Ann. § 30–1–9 (Lexis Supp. 2004)
Vermont	18	Vt. Stat. Ann., Tit. 18, § 5142 (Lexis 2000)

Virginia	18	Va. Code Ann. §§20–45.1, 20–48, 20–49 (Lexis 2004)
Washington	18	Wash. Rev. Code Ann. §26.04.210 (West 2005)
West Virginia	18	W. Va. Code §48–2–301 (Lexis 2004)
Wisconsin	18	Wis. Stat. §765.02 (2001)
Wyoming	18	Wyo. Stat. Ann. §20–1–102 (Lexis 2003)

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. See *Stanford* v. *Kentucky*, 492 U. S. 361, 368 (1989) (describing the common law at the time of the Amendment's adoption). The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day—Alexander Hamilton, for example—were sitting with us today, I would expect them to join JUSTICE KENNEDY's opinion for the Court. In all events, I do so without hesitation.

JUSTICE O'CONNOR, dissenting.

The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense. Neither the objective evidence of contemporary societal values, nor the Court's moral proportionality analysis, nor the two in tandem suffice to justify this ruling.

Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of 17-year-old offenders, it refrains from asserting that its holding is compelled by a genuine national consensus. Indeed, the evidence before us fails to demonstrate conclusively that any such consensus has emerged in the brief period since we upheld the constitutionality of this practice in *Stanford* v. *Kentucky*, 492 U. S. 361 (1989).

Instead, the rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender. I do not subscribe to this judgment. Adolescents *as a class* are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.

On this record—and especially in light of the fact that so little has changed since our recent decision in *Stanford*—I would not substitute our judgment about the moral propriety of capital punishment for 17-year-old murderers for the judgments of the Nation's legislatures. Rather, I would demand a clearer showing that our society truly has set its face against this practice before reading the Eighth Amendment categorically to forbid it.

I

A

Let me begin by making clear that I agree with much of the Court's description of the general principles that guide our Eighth Amendment jurisprudence. The Amendment

bars not only punishments that are inherently "'barbaric,'" but also those that are "'excessive' in relation to the crime committed." *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion). A sanction is therefore beyond the State's authority to inflict if it makes "no measurable contribution" to acceptable penal goals or is "grossly out of proportion to the severity of the crime." *Ibid.* The basic "precept of justice that punishment for crime should be . . . proportioned to [the] offense," *Weems* v. *United States*, 217 U. S. 349, 367 (1910), applies with special force to the death penalty. In capital cases, the Constitution demands that the punishment be tailored both to the nature of the crime itself and to the defendant's "personal responsibility and moral guilt." *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982); see also *id.*, at 825 (O'CONNOR, J., dissenting); *Tison* v. *Arizona*, 481 U. S. 137, 149 (1987); *Eddings* v. *Oklahoma*, 455 U. S. 104, 111–112 (1982).

It is by now beyond serious dispute that the Eighth Amendment's prohibition of "cruel and unusual punishments" is not a static command. Its mandate would be little more than a dead letter today if it barred only those sanctions—like the execution of children under the age of seven—that civilized society had already repudiated in 1791. See *ante*, at 587 (STEVENS, J., concurring); cf. *Stanford*, *supra*, at 368 (discussing the common law rule at the time the Bill of Rights was adopted). Rather, because "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 100–101 (1958) (plurality opinion). In discerning those standards, we look to "objective factors to the maximum possible extent." *Coker*, *supra*, at 592 (plurality opinion). Laws enacted by the Nation's legislatures provide the "clearest and most reliable objective evidence of contemporary values." *Penry* v. *Lynaugh*, 492 U. S. 302, 331 (1989).

And data reflecting the actions of sentencing juries, where available, can also afford "'a significant and reliable objective index'" of societal mores. *Coker, supra,* at 596 (plurality opinion) (quoting *Gregg* v. *Georgia,* 428 U. S. 153, 181 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.)).

Although objective evidence of this nature is entitled to great weight, it does not end our inquiry. Rather, as the Court today reaffirms, see *ante,* at 563, 574–575, "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment," *Coker, supra,* at 597 (plurality opinion). "[P]roportionality—at least as regards capital punishment—not only requires an inquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness." *Enmund, supra,* at 815 (O'CONNOR, J., dissenting). We therefore have a "constitutional obligation" to judge for ourselves whether the death penalty is excessive punishment for a particular offense or class of offenders. See *Stanford,* 492 U. S., at 382 (O'CONNOR, J., concurring in part and concurring in judgment); see also *Enmund, supra,* at 797 ("[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty").

B

Twice in the last two decades, the Court has applied these principles in deciding whether the Eighth Amendment permits capital punishment of adolescent offenders. In *Thompson* v. *Oklahoma,* 487 U. S. 815 (1988), a plurality of four Justices concluded that the Eighth Amendment barred capital punishment of an offender for a crime committed before the age of 16. I concurred in that judgment on narrower grounds. At the time, 32 state legislatures had "definitely concluded that no 15-year-old should be exposed to the threat

of execution," and no legislature had affirmatively endorsed such a practice. *Id.*, at 849 (O'CONNOR, J., concurring in judgment). While acknowledging that a national consensus forbidding the execution of 15-year-old offenders "very likely" did exist, I declined to adopt that conclusion as a matter of constitutional law without clearer evidentiary support. *Ibid.* Nor, in my view, could the issue be decided based on moral proportionality arguments of the type advanced by the Court today. Granting the premise "that adolescents are generally less blameworthy than adults who commit similar crimes," I wrote, "it does not necessarily follow that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment." *Id.*, at 853. Similarly, we had before us no evidence "that 15-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty." *Ibid.* I determined instead that, in light of the strong but inconclusive evidence of a national consensus against capital punishment of under-16 offenders, concerns rooted in the Eighth Amendment required that we apply a clear statement rule. Because the capital punishment statute in *Thompson* did not specify the minimum age at which commission of a capital crime would be punishable by death, I concluded that the statute could not be read to authorize the death penalty for a 15-year-old offender. *Id.*, at 857–858.

The next year, in *Stanford* v. *Kentucky*, *supra*, the Court held that the execution of 16- or 17-year-old capital murderers did not violate the Eighth Amendment. I again wrote separately, concurring in part and concurring in the judgment. At that time, 25 States did not permit the execution of under-18 offenders, including 13 that lacked the death penalty altogether. See *id.*, at 370. While noting that "[t]he day may come when there is such general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed," I concluded that that day had not yet arrived. *Id.*,

at 381–382. I reaffirmed my view that, beyond assessing the actions of legislatures and juries, the Court has a constitutional obligation to judge for itself whether capital punishment is a proportionate response to the defendant's blameworthiness. *Id.*, at 382. Nevertheless, I concluded that proportionality arguments similar to those endorsed by the Court today did not justify a categorical Eighth Amendment rule against capital punishment of 16- and 17-year-old offenders. See *ibid.* (citing *Thompson*, *supra*, at 853–854 (O'CONNOR, J., concurring in judgment)).

The Court has also twice addressed the constitutionality of capital punishment of mentally retarded offenders. In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), decided the same year as *Stanford*, we rejected the claim that the Eighth Amendment barred the execution of the mentally retarded. At that time, only two States specifically prohibited the practice, while 14 others did not have capital punishment at all. 492 U. S., at 334. Much had changed when we revisited the question three Terms ago in *Atkins* v. *Virginia*, 536 U. S. 304 (2002). In *Atkins*, the Court reversed *Penry* and held that the Eighth Amendment forbids capital punishment of mentally retarded offenders. 536 U. S., at 321. In the 13 years between *Penry* and *Atkins*, there had been a wave of legislation prohibiting the execution of such offenders. By the time we heard *Atkins*, 30 States barred the death penalty for the mentally retarded, and even among those States theoretically permitting such punishment, very few had executed a mentally retarded offender in recent history. 536 U. S., at 314–316. On the basis of this evidence, the Court determined that it was "fair to say that a national consensus ha[d] developed against" the practice. *Id.*, at 316.

But our decision in *Atkins* did not rest solely on this tentative conclusion. Rather, the Court's independent moral judgment was dispositive. The Court observed that mentally retarded persons suffer from major cognitive and be-

havioral deficits, *i. e.*, "subaverage intellectual functioning" and "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.*, at 318. "Because of their impairments, [such persons] by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Ibid.* We concluded that these deficits called into serious doubt whether the execution of mentally retarded offenders would measurably contribute to the principal penological goals that capital punishment is intended to serve—retribution and deterrence. *Id.*, at 319–321. Mentally retarded offenders' impairments so diminish their personal moral culpability that it is highly unlikely that such offenders could ever deserve the ultimate punishment, even in cases of capital murder. *Id.*, at 319. And these same impairments made it very improbable that the threat of the death penalty would deter mentally retarded persons from committing capital crimes. *Id.*, at 319–320. Having concluded that capital punishment of the mentally retarded is inconsistent with the Eighth Amendment, the Court "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id.*, at 317 (quoting *Ford* v. *Wainwright*, 477 U. S. 399, 416–417 (1986)).

II

A

Although the general principles that guide our Eighth Amendment jurisprudence afford some common ground, I part ways with the Court in applying them to the case before us. As a preliminary matter, I take issue with the Court's failure to reprove, or even to acknowledge, the Supreme Court of Missouri's unabashed refusal to follow our

controlling decision in *Stanford*. The lower court concluded that, despite *Stanford*'s clear holding and historical recency, our decision was no longer binding authority because it was premised on what the court deemed an obsolete assessment of contemporary values. Quite apart from the merits of the constitutional question, this was clear error.

Because the Eighth Amendment "draw[s] its meaning from . . . evolving standards of decency," *Trop*, 356 U. S., at 101 (plurality opinion), significant changes in societal mores over time may require us to reevaluate a prior decision. Nevertheless, it remains "*this* Court's prerogative *alone* to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997) (emphasis added). That is so even where subsequent decisions or factual developments may appear to have "significantly undermined" the rationale for our earlier holding. *United States* v. *Hatter*, 532 U. S. 557, 567 (2001); see also *State Oil Co.*, *supra*, at 20; *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). The Eighth Amendment provides no exception to this rule. On the contrary, clear, predictable, and uniform constitutional standards are especially desirable in this sphere. By affirming the lower court's judgment without so much as a slap on the hand, today's decision threatens to invite frequent and disruptive reassessments of our Eighth Amendment precedents.

B

In determining whether the juvenile death penalty comports with contemporary standards of decency, our inquiry begins with the "clearest and most reliable objective evidence of contemporary values"—the actions of the Nation's legislatures. *Penry*, *supra*, at 331. As the Court emphasizes, the overall number of jurisdictions that currently disallow the execution of under-18 offenders is the same as the number that forbade the execution of mentally retarded offenders when *Atkins* was decided.

Ante, at 564. At present, 12 States and the District of Columbia do not have the death penalty, while an additional 18 States and the Federal Government authorize capital punishment but prohibit the execution of under-18 offenders. See *ante*, at 580–581 (Appendix A). And here, as in *Atkins*, only a very small fraction of the States that permit capital punishment of offenders within the relevant class has actually carried out such an execution in recent history: Six States have executed under-18 offenders in the 16 years since *Stanford*, while five States had executed mentally retarded offenders in the 13 years prior to *Atkins*. See *Atkins*, 536 U. S., at 316; V. Streib, The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973–December 31, 2004, No. 76, pp. 15–23 (2005), available at http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf (last updated Jan. 31, 2005) (as visited Feb. 25, 2005, and available in Clerk of Court's case file) (hereinafter Streib). In these respects, the objective evidence in this case is, indeed, "similar, and in some respects parallel to," the evidence upon which we relied in *Atkins*. *Ante*, at 564.

While the similarities between the two cases are undeniable, the objective evidence of national consensus is marginally weaker here. Most importantly, in *Atkins* there was significant evidence of *opposition* to the execution of the mentally retarded, but there was virtually no countervailing evidence of affirmative legislative *support* for this practice. Cf. *Thompson*, 487 U. S., at 849 (O'CONNOR, J., concurring in judgment) (attributing significance to the fact that "no legislature in this country has affirmatively and unequivocally endorsed" capital punishment of 15-year-old offenders). The States that permitted such executions did so only because they had not enacted any prohibitory legislation. Here, by contrast, at least seven States have current statutes that specifically set 16 or 17 as the minimum age at which

commission of a capital crime can expose the offender to the death penalty. See *ante*, at 579–580 (Appendix A).* Five of these seven States presently have one or more juvenile offenders on death row (six if respondent is included in the count), see Streib 24–31, and four of them have executed at least one under-18 offender in the past 15 years, see *id.*, at 15–23. In all, there are currently over 70 juvenile offenders on death row in 12 different States (13 including respondent). See *id.*, at 11, 24–31. This evidence suggests some measure of continuing public support for the availability of the death penalty for 17-year-old capital murderers.

Moreover, the Court in *Atkins* made clear that it was "not so much the number of [States forbidding execution of the mentally retarded] that [was] significant, but the consistency of the direction of change." 536 U. S., at 315. In contrast to the trend in *Atkins*, the States have not moved uniformly toward abolishing the juvenile death penalty. Instead, since our decision in *Stanford*, two States have expressly reaffirmed their support for this practice by enacting statutes setting 16 as the minimum age for capital punishment. See Mo. Rev. Stat. § 565.020.2 (2000); Va. Code Ann. § 18.2–10(a) (Lexis 2004). Furthermore, as the Court emphasized in *Atkins* itself, 536 U. S., at 315, n. 18, the pace of legislative action in this context has been considerably slower than it was with regard to capital punishment of the mentally re-

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*In 12 other States that have capital punishment, under-18 offenders can be subject to the death penalty as a result of transfer statutes that permit such offenders to be tried as adults for certain serious crimes. See *ante*, at 579–580 (Appendix A). As I observed in *Thompson* v. *Oklahoma*, 487 U. S. 815, 850–852 (1988) (opinion concurring in judgment): "There are many reasons, having nothing whatsoever to do with capital punishment, that might motivate a legislature to provide as a general matter for some [minors] to be channeled into the adult criminal justice process." Accordingly, while these 12 States clearly cannot be counted as *opposing* capital punishment of under-18 offenders, the fact that they permit such punishment through this indirect mechanism does not necessarily show affirmative and unequivocal legislative support for the practice. See *ibid.*

tarded. In the 13 years between our decisions in *Penry* and *Atkins*, no fewer than 16 States banned the execution of mentally retarded offenders. See *Atkins*, *supra*, at 314–315. By comparison, since our decision 16 years ago in *Stanford*, only four States that previously permitted the execution of under-18 offenders, plus the Federal Government, have legislatively reversed course, and one additional State's high court has construed the State's death penalty statute not to apply to under-18 offenders, see *State* v. *Furman*, 122 Wash. 2d 440, 458, 858 P. 2d 1092, 1103 (1993) (en banc). The slower pace of change is no doubt partially attributable, as the Court says, to the fact that 12 States had already imposed a minimum age of 18 when *Stanford* was decided. See *ante*, at 566–567. Nevertheless, the extraordinary wave of legislative action leading up to our decision in *Atkins* provided strong evidence that the country truly had set itself against capital punishment of the mentally retarded. Here, by contrast, the halting pace of change gives reason for pause.

To the extent that the objective evidence supporting today's decision is similar to that in *Atkins*, this merely highlights the fact that such evidence is not dispositive in either of the two cases. After all, as the Court today confirms, *ante*, at 563, 574–575, the Constitution requires that "'in the end our own judgment . . . be brought to bear'" in deciding whether the Eighth Amendment forbids a particular punishment, *Atkins*, *supra*, at 312 (quoting *Coker*, 433 U. S., at 597 (plurality opinion)). This judgment is not merely a rubber stamp on the tally of legislative and jury actions. Rather, it is an integral part of the Eighth Amendment inquiry—and one that is entitled to independent weight in reaching our ultimate decision.

Here, as in *Atkins*, the objective evidence of a national consensus is weaker than in most prior cases in which the Court has struck down a particular punishment under the Eighth Amendment. See *Coker*, *supra*, at 595–596 (plurality opinion) (striking down death penalty for rape of an adult

woman, where only one jurisdiction authorized such punishment); *Enmund*, 458 U. S., at 792 (striking down death penalty for certain crimes of aiding and abetting felony-murder, where only eight jurisdictions authorized such punishment); *Ford* v. *Wainwright*, 477 U. S., at 408 (striking down capital punishment of the insane, where no jurisdiction permitted this practice). In my view, the objective evidence of national consensus, standing alone, was insufficient to dictate the Court's holding in *Atkins*. Rather, the compelling moral proportionality argument against capital punishment of mentally retarded offenders played a *decisive* role in persuading the Court that the practice was inconsistent with the Eighth Amendment. Indeed, the force of the proportionality argument in *Atkins* significantly bolstered the Court's confidence that the objective evidence in that case did, in fact, herald the emergence of a genuine national consensus. Here, by contrast, the proportionality argument against the juvenile death penalty is so flawed that it can be given little, if any, analytical weight—it proves too weak to resolve the lingering ambiguities in the objective evidence of legislative consensus or to justify the Court's categorical rule.

C

Seventeen-year-old murderers must be categorically exempted from capital punishment, the Court says, because they "cannot with reliability be classified among the worst offenders." *Ante*, at 569. That conclusion is premised on three perceived differences between "adults," who have already reached their 18th birthdays, and "juveniles," who have not. See *ante*, at 569–570. First, juveniles lack maturity and responsibility and are more reckless than adults. Second, juveniles are more vulnerable to outside influences because they have less control over their surroundings. And third, a juvenile's character is not as fully formed as that of an adult. Based on these characteristics, the Court determines that 17-year-old capital murderers are not as

blameworthy as adults guilty of similar crimes; that 17-year-olds are less likely than adults to be deterred by the prospect of a death sentence; and that it is difficult to conclude that a 17-year-old who commits even the most heinous of crimes is "irretrievably depraved." *Ante*, at 570–572. The Court suggests that "a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death." *Ante*, at 572. However, the Court argues that a categorical age-based prohibition is justified as a prophylactic rule because "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Ante*, at 572–573.

It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles' comparative moral culpability. See, *e. g.*, *Johnson* v. *Texas*, 509 U. S. 350, 367 (1993) ("There is no dispute that a defendant's youth is a relevant mitigating circumstance"); *id.*, at 376 (O'CONNOR, J., dissenting) ("[T]he vicissitudes of youth bear directly on the young offender's culpability and responsibility for the crime"); *Eddings*, 455 U. S., at 115–116 ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults"). But even accepting this premise, the Court's proportionality argument fails to support its categorical rule.

First, the Court adduces no evidence whatsoever in support of its sweeping conclusion, see *ante*, at 572, that it is only in "rare" cases, if ever, that 17-year-old murderers are sufficiently mature and act with sufficient depravity to warrant the death penalty. The fact that juveniles are generally *less* culpable for their misconduct than adults does not necessarily mean that a 17-year-old murderer cannot be *sufficiently* culpable to merit the death penalty. At most, the

Court's argument suggests that the average 17-year-old murderer is not as culpable as the average adult murderer. But an especially depraved juvenile offender may nevertheless be just as culpable as many adult offenders considered bad enough to deserve the death penalty. Similarly, the fact that the availability of the death penalty may be *less* likely to deter a juvenile from committing a capital crime does not imply that this threat cannot *effectively* deter some 17-year-olds from such an act. Surely there is an age below which no offender, no matter what his crime, can be deemed to have the cognitive or emotional maturity necessary to warrant the death penalty. But at least at the margins between adolescence and adulthood—and especially for 17-year-olds such as respondent—the relevant differences between "adults" and "juveniles" appear to be a matter of degree, rather than of kind. It follows that a legislature may reasonably conclude that at least *some* 17-year-olds can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, that capital punishment may be warranted in an appropriate case.

Indeed, this appears to be just such a case. Christopher Simmons' murder of Shirley Crook was premeditated, wanton, and cruel in the extreme. Well before he committed this crime, Simmons declared that he wanted to kill someone. On several occasions, he discussed with two friends (ages 15 and 16) his plan to burglarize a house and to murder the victim by tying the victim up and pushing him from a bridge. Simmons said they could "'get away with it'" because they were minors. Brief for Petitioner 3. In accord with this plan, Simmons and his 15-year-old accomplice broke into Mrs. Crook's home in the middle of the night, forced her from her bed, bound her, and drove her to a state park. There, they walked her to a railroad trestle spanning a river, "hog-tied" her with electrical cable, bound her face completely with duct tape, and pushed her, still alive, from the trestle. She drowned in the water below. *Id.*, at 4. One can

scarcely imagine the terror that this woman must have suffered throughout the ordeal leading to her death. Whatever can be said about the comparative moral culpability of 17-year-olds as a general matter, Simmons' actions unquestionably reflect "'a consciousness materially more "depraved" than that of' . . . the average murderer." *Atkins*, 536 U. S., at 319 (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980)). And Simmons' prediction that he could murder with impunity because he had not yet turned 18—though inaccurate—suggests that he *did* take into account the perceived risk of punishment in deciding whether to commit the crime. Based on this evidence, the sentencing jury certainly had reasonable grounds for concluding that, despite Simmons' youth, he "ha[d] sufficient psychological maturity" when he committed this horrific murder, and "at the same time demonstrate[d] sufficient depravity, to merit a sentence of death." *Ante*, at 572.

The Court's proportionality argument suffers from a second and closely related defect: It fails to establish that the differences in maturity between 17-year-olds and young "adults" are both universal enough and significant enough to justify a bright-line prophylactic rule against capital punishment of the former. The Court's analysis is premised on differences *in the aggregate* between juveniles and adults, which frequently do not hold true when comparing individuals. Although it may be that many 17-year-old murderers lack sufficient maturity to deserve the death penalty, some juvenile murderers may be quite mature. Chronological age is not an unfailing measure of psychological development, and common experience suggests that many 17-year-olds are more mature than the average young "adult." In short, the class of offenders exempted from capital punishment by today's decision is too broad and too diverse to warrant a categorical prohibition. Indeed, the age-based line drawn by the Court is indefensibly arbitrary—it quite likely will protect a number of offenders who are mature enough to

deserve the death penalty and may well leave vulnerable many who are not.

For purposes of proportionality analysis, 17-year-olds as a class are qualitatively and materially different from the mentally retarded. "Mentally retarded" offenders, as we understood that category in *Atkins*, are *defined* by precisely the characteristics which render death an excessive punishment. A mentally retarded person is, "by definition," one whose cognitive and behavioral capacities have been proved to fall below a certain minimum. See *Atkins*, 536 U. S., at 318; see also *id.*, at 308, n. 3 (discussing characteristics of mental retardation); *id.*, at 317, and n. 22 (leaving to the States the development of mechanisms to determine which offenders fall within the class exempt from capital punishment). Accordingly, for purposes of our decision in *Atkins*, the mentally retarded are not merely *less* blameworthy for their misconduct or *less* likely to be deterred by the death penalty than others. Rather, a mentally retarded offender is one whose demonstrated impairments make it so highly unlikely that he is culpable enough to deserve the death penalty or that he could have been deterred by the threat of death, that execution is not a defensible punishment. There is no such inherent or accurate fit between an offender's chronological age and the personal limitations which the Court believes make capital punishment excessive for 17-year-old murderers. Moreover, it defies common sense to suggest that 17-year-olds as a class are somehow equivalent to mentally retarded persons with regard to culpability or susceptibility to deterrence. Seventeen-year-olds may, on average, be less mature than adults, but that lesser maturity simply cannot be equated with the major, lifelong impairments suffered by the mentally retarded.

The proportionality issues raised by the Court clearly implicate Eighth Amendment concerns. But these concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized

sentencing in which juries are required to give appropriate mitigating weight to the defendant's immaturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth. In that way the constitutional response can be tailored to the specific problem it is meant to remedy. The Eighth Amendment guards against the execution of those who are "insufficient[ly] culpab[le]," see *ante*, at 573, in significant part, by requiring sentencing that "reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring). Accordingly, the sentencer in a capital case must be permitted to give full effect to all constitutionally relevant mitigating evidence. See *Tennard* v. *Dretke*, 542 U. S. 274, 283–285 (2004); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). A defendant's youth or immaturity is, of course, a paradigmatic example of such evidence. See *Eddings*, 455 U. S., at 115–116.

Although the prosecutor's apparent attempt to use respondent's youth as an aggravating circumstance in this case is troubling, that conduct was never challenged with specificity in the lower courts and is not directly at issue here. As the Court itself suggests, such "overreaching" would best be addressed, if at all, through a more narrowly tailored remedy. See *ante*, at 573. The Court argues that sentencing juries cannot accurately evaluate a youthful offender's maturity or give appropriate weight to the mitigating characteristics related to youth. But, again, the Court presents no real evidence—and the record appears to contain none—supporting this claim. Perhaps more importantly, the Court fails to explain why this duty should be so different from, or so much more difficult than, that of assessing and giving proper effect to any other qualitative capital sentencing factor. I would not be so quick to conclude that the constitutional safeguards, the sentencing juries, and the trial judges upon

which we place so much reliance in all capital cases are inadequate in this narrow context.

D

I turn, finally, to the Court's discussion of foreign and international law. Without question, there has been a global trend in recent years toward abolishing capital punishment for under-18 offenders. Very few, if any, countries other than the United States now permit this practice in law or in fact. See *ante*, at 576–577. While acknowledging that the actions and views of other countries do not dictate the outcome of our Eighth Amendment inquiry, the Court asserts that "the overwhelming weight of international opinion against the juvenile death penalty . . . does provide respected and significant confirmation for [its] own conclusions." *Ante*, at 578. Because I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such *confirmatory* role to the international consensus described by the Court. In short, the evidence of an international consensus does not alter my determination that the Eighth Amendment does not, at this time, forbid capital punishment of 17-year-old murderers in all cases.

Nevertheless, I disagree with JUSTICE SCALIA's contention, *post*, at 622–628 (dissenting opinion), that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. See *Atkins*, *supra*, at 317, n. 21; *Thompson*, 487 U. S., at 830–831, and n. 31 (plurality opinion); *Enmund*, 458 U. S., at 796–797, n. 22; *Coker*, 433 U. S., at 596, n. 10 (plurality opinion); *Trop*, 356 U. S., at 102–103 (plurality opinion). This inquiry reflects the special character of the Eighth

Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society. Obviously, American law is distinctive in many respects, not least where the specific provisions of our Constitution and the history of its exposition so dictate. Cf. *post*, at 624–625 (SCALIA, J., dissenting) (discussing distinctively American rules of law related to the Fourth Amendment and the Establishment Clause). But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.

* * *

In determining whether the Eighth Amendment permits capital punishment of a particular offense or class of offenders, we must look to whether such punishment is consistent with contemporary standards of decency. We are obligated to weigh both the objective evidence of societal values and our own judgment as to whether death is an excessive sanction in the context at hand. In the instant case, the objective evidence is inconclusive; standing alone, it does not demonstrate that our society has repudiated capital punishment of 17-year-old offenders in all cases. Rather, the actions of the Nation's legislatures suggest that, although a clear and durable national consensus against this practice may in time

emerge, that day has yet to arrive. By acting so soon after our decision in *Stanford*, the Court both pre-empts the democratic debate through which genuine consensus might develop and simultaneously runs a considerable risk of inviting lower court reassessments of our Eighth Amendment precedents.

To be sure, the objective evidence supporting today's decision is similar to (though marginally weaker than) the evidence before the Court in *Atkins*. But *Atkins* could not have been decided as it was based solely on such evidence. Rather, the compelling proportionality argument against capital punishment of the mentally retarded played a decisive role in the Court's Eighth Amendment ruling. Moreover, the constitutional rule adopted in *Atkins* was tailored to this proportionality argument: It exempted from capital punishment a defined group of offenders whose proven impairments rendered it highly unlikely, and perhaps impossible, that they could act with the degree of culpability necessary to deserve death. And *Atkins* left to the States the development of mechanisms to determine which individual offenders fell within this class.

In the instant case, by contrast, the moral proportionality arguments against the juvenile death penalty fail to support the rule the Court adopts today. There is no question that "the chronological age of a minor is itself a relevant mitigating factor of great weight," *Eddings*, 455 U. S., at 116, and that sentencing juries must be given an opportunity carefully to consider a defendant's age and maturity in deciding whether to assess the death penalty. But the mitigating characteristics associated with youth do not justify an absolute age limit. A legislature can reasonably conclude, as many have, that some 17-year-old murderers are mature enough to deserve the death penalty in an appropriate case. And nothing in the record before us suggests that sentencing juries are so unable accurately to assess a 17-year-old de-

fendant's maturity, or so incapable of giving proper weight to youth as a mitigating factor, that the Eighth Amendment requires the bright-line rule imposed today. In the end, the Court's flawed proportionality argument simply cannot bear the weight the Court would place upon it.

Reasonable minds can differ as to the minimum age at which commission of a serious crime should expose the defendant to the death penalty, if at all. Many jurisdictions have abolished capital punishment altogether, while many others have determined that even the most heinous crime, if committed before the age of 18, should not be punishable by death. Indeed, were my office that of a legislator, rather than a judge, then I, too, would be inclined to support legislation setting a minimum age of 18 in this context. But a significant number of States, including Missouri, have decided to make the death penalty potentially available for 17-year-old capital murderers such as respondent. Without a clearer showing that a genuine national consensus forbids the execution of such offenders, this Court should not substitute its own "inevitably subjective judgment" on how best to resolve this difficult moral question for the judgments of the Nation's democratically elected legislatures. See *Thompson*, 487 U. S., at 854 (O'CONNOR, J., concurring in judgment). I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961). But Hamilton had in mind a traditional judiciary, "bound down by strict rules and precedents which serve to define

and point out their duty in every particular case that comes before them." *Id.*, at 471. Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," *ante*, at 561 (internal quotation marks omitted), of our national society. It then finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists. Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Ante*, at 563 (internal quotation marks omitted). The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

I

In determining that capital punishment of offenders who committed murder before age 18 is "cruel and unusual" under the Eighth Amendment, the Court first considers, in accordance with our modern (though in my view mistaken) jurisprudence, whether there is a "national consensus," *ibid.* (internal quotation marks omitted), that laws allowing such

executions contravene our modern "standards of decency,"[1] *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958). We have held that this determination should be based on "objective indicia that reflect the public attitude toward a given sanction"—namely, "statutes passed by society's elected representatives." *Stanford* v. *Kentucky*, 492 U. S. 361, 370 (1989) (internal quotation marks omitted). As in *Atkins* v. *Virginia*, 536 U. S. 304, 312 (2002), the Court dutifully recites this test and claims halfheartedly that a national consensus has emerged since our decision in *Stanford*, because 18 States—or 47% of States that permit capital punishment—now have legislation prohibiting the execution of offenders under 18, and because all of 4 States have adopted such legislation since *Stanford*. See *ante*, at 565.

Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus. See *Atkins*, *supra*, at 342–345 (SCALIA, J., dissenting). Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time. In *Coker* v. *Georgia*, 433 U. S. 584, 595–596 (1977), a plurality concluded the Eighth Amendment prohibited capital punishment for rape of an adult woman where only one jurisdiction authorized such punishment. The plurality also observed that "[a]t no time in the last 50 years ha[d] a majority of

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[1] The Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment: whether it is one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford* v. *Wainwright*, 477 U. S. 399, 405 (1986). As we have noted in prior cases, the evidence is unusually clear that the Eighth Amendment was not originally understood to prohibit capital punishment for 16- and 17-year-old offenders. See *Stanford* v. *Kentucky*, 492 U. S. 361, 368 (1989). At the time the Eighth Amendment was adopted, the death penalty could theoretically be imposed for the crime of a 7-year-old, though there was a rebuttable presumption of incapacity to commit a capital (or other) felony until the age of 14. See *ibid.* (citing 4 W. Blackstone, Commentaries *23–*24; 1 M. Hale, Pleas of the Crown 24–29 (1800)).

States authorized death as a punishment for rape." *Id.*, at 593. In *Ford* v. *Wainwright*, 477 U. S. 399, 408 (1986), we held execution of the insane unconstitutional, tracing the roots of this prohibition to the common law and noting that "no State in the union permits the execution of the insane." In *Enmund* v. *Florida*, 458 U. S. 782, 792 (1982), we invalidated capital punishment imposed for participation in a robbery in which an accomplice committed murder, because 78% of all death penalty States prohibited this punishment. Even there we expressed some hesitation, because the legislative judgment was "neither 'wholly unanimous among state legislatures,' . . . nor as compelling as the legislative judgments considered in *Coker*." *Id.*, at 793. By contrast, agreement among 42% of death penalty States in *Stanford*, which the Court appears to believe was correctly decided at the time, *ante*, at 574, was insufficient to show a national consensus. See *Stanford*, *supra*, at 372.

In an attempt to keep afloat its implausible assertion of national consensus, the Court throws overboard a proposition well established in our Eighth Amendment jurisprudence. "It should be observed," the Court says, "that the *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty . . . ; a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." *Ante*, at 574. The insinuation that the Court's new method of counting contradicts only "the *Stanford* Court" is misleading. *None* of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely. See *Ford*, *supra*, at 408, n. 2; *Enmund*, *supra*, at 789; *Coker*, *supra*, at 594. And with good reason. Consulting States that bar the death penalty concerning the necessity of making an exception to the pen-

alty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of *course* they don't like it, but that sheds no light whatever on the point at issue. That 12 States favor *no* executions says something about consensus against the death penalty, but nothing—absolutely nothing—about consensus that offenders under 18 deserve special immunity from such a penalty. In repealing the death penalty, those 12 States considered *none* of the factors that the Court puts forth as determinative of the issue before us today—lower culpability of the young, inherent recklessness, lack of capacity for considered judgment, etc. What might be relevant, perhaps, is how many of those States permit 16- and 17-year-old offenders to be treated as adults with respect to noncapital offenses. (They all do;[2] indeed, some even *require* that juveniles as young as 14 be tried as adults if they are charged with murder.[3]) The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation.

Recognizing that its national-consensus argument was weak compared with our earlier cases, the *Atkins* Court found additional support in the fact that 16 States had prohibited execution of mentally retarded individuals since

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[2] See Alaska Stat. § 47.12.030 (Lexis 2002); Haw. Rev. Stat. § 571–22 (1999); Iowa Code § 232.45 (2003); Me. Rev. Stat. Ann., Tit. 15, § 3101(4) (West 2003); Mass. Gen. Laws Ann., ch. 119, § 74 (West 2003); Mich. Comp. Laws Ann. § 764.27 (West 2000); Minn. Stat. § 260B.125 (2004); N. D. Cent. Code § 27–20–34 (Lexis Supp. 2003); R. I. Gen. Laws § 14–1–7 (Lexis 2002); Vt. Stat. Ann., Tit. 33, § 5516 (Lexis 2001); W. Va. Code § 49–5–10 (Lexis 2004); Wis. Stat. § 938.18 (2003–2004); see also National Center for Juvenile Justice, Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws 1 (Oct. 2003). The District of Columbia is the only jurisdiction without a death penalty that specifically exempts under-18 offenders from its harshest sanction—life imprisonment without parole. See D. C. Code § 22–2104 (West 2001).

[3] See Mass. Gen. Laws Ann., ch. 119, § 74 (West 2003); N. D. Cent. Code § 27–20–34 (Lexis Supp. 2003); W. Va. Code § 49–5–10 (Lexis 2004).

Penry v. *Lynaugh*, 492 U. S. 302 (1989). *Atkins*, 536 U. S., at 314–316. Indeed, the *Atkins* Court distinguished *Stanford* on that very ground, explaining that "[a]lthough we decided *Stanford* on the same day as *Penry*, apparently *only two* state legislatures have raised the threshold age for imposition of the death penalty." 536 U. S., at 315, n. 18 (emphasis added). Now, the Court says a legislative change in four States is "significant" enough to trigger a constitutional prohibition.[4] *Ante*, at 566. It is amazing to think that this subtle shift in numbers can take the issue entirely off the table for legislative debate.

I also doubt whether many of the legislators who voted to change the laws in those four States would have done so if they had known their decision would (by the pronouncement of this Court) be rendered irreversible. After all, legislative support for capital punishment, in any form, has surged and ebbed throughout our Nation's history. As JUSTICE O'CONNOR has explained:

> "The history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case. In 1846, Michigan became the first State to abolish the death penalty . . . . In succeeding decades, other American States continued the trend towards abolition . . . . Later, and particularly after World War II, there ensued a steady and dramatic decline in executions . . . . In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968. . . .

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[4] As the Court notes, Washington State's decision to prohibit executions of offenders under 18 was made by a judicial, not legislative, decision. *State* v. *Furman*, 122 Wash. 2d 440, 459, 858 P. 2d 1092, 1103 (1993), construed the State's death penalty statute—which did not set any age limit—to apply only to persons over 18. The opinion found that construction necessary to avoid what it considered constitutional difficulties, and did not purport to reflect popular sentiment. It is irrelevant to the question of changed national consensus.

> "In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. . . . We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject." *Thompson* v. *Oklahoma*, 487 U. S. 815, 854–855 (1988) (opinion concurring in judgment).

Relying on such narrow margins is especially inappropriate in light of the fact that a number of legislatures and voters have expressly affirmed their support for capital punishment of 16- and 17-year-old offenders since *Stanford*. Though the Court is correct that no State has lowered its death penalty age, both the Missouri and Virginia Legislatures—which, at the time of *Stanford*, had no minimum age requirement—expressly established 16 as the minimum. Mo. Rev. Stat. § 565.020.2 (2000); Va. Code Ann. § 18.2–10(a) (Lexis 2004). The people of Arizona[5] and Florida[6] have

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[5] In 1996, Arizona's Ballot Proposition 102 exposed under-18 murderers to the death penalty by automatically transferring them out of juvenile courts. The statute implementing the proposition required the county attorney to "bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is fifteen, sixteen or seventeen years of age and is accused of . . . first degree murder." Ariz. Rev. Stat. Ann. § 13–501 (West 2001). The Arizona Supreme Court has added to this scheme a constitutional requirement that there be an individualized assessment of the juvenile's maturity at the time of the offense. See *State* v. *Davolt*, 207 Ariz. 191, 214–216, 84 P. 3d 456, 479–481 (2004).

[6] Florida voters approved an amendment to the State Constitution, which changed the wording from "cruel *or* unusual" to "cruel *and* unusual," Fla. Const., Art. I, § 17 (2003). See Commentary to 1998 Amendment, 25B Fla. Stat. Ann., p. 180 (West 2004). This was a response to a

done the same by ballot initiative. Thus, even States that have not executed an under-18 offender in recent years unquestionably favor the possibility of capital punishment in some circumstances.

The Court's reliance on the infrequency of executions for under-18 murderers, *ante*, at 564–565, 567, credits an argument that this Court considered and explicitly rejected in *Stanford*. That infrequency is explained, we accurately said, both by "the undisputed fact that a far smaller percentage of capital crimes are committed by persons under 18 than over 18," 492 U. S., at 374, and by the fact that juries are required at sentencing to consider the offender's youth as a mitigating factor, see *Eddings* v. *Oklahoma*, 455 U. S. 104, 115–116 (1982). Thus, "it is not only possible, but overwhelmingly probable, that the very considerations which induce [respondent] and [his] supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed." *Stanford*, *supra*, at 374.

It is, furthermore, unclear that executions of the relevant age group have decreased since we decided *Stanford*. Between 1990 and 2003, 123 of 3,599 death sentences, or 3.4%, were given to individuals who committed crimes before reaching age 18. V. Streib, The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973–September 30, 2004, No. 75, p. 9 (Table 3) (last updated Oct. 5, 2004), http://www.law.onu.edu/faculty/streib/documents/JuvDeathSept302004.pdf (all Internet materials as visited Jan. 12, 2005, and available in Clerk of Court's case file) (hereinafter Juvenile Death Penalty Today).

Florida Supreme Court ruling that "cruel *or* unusual" excluded the death penalty for a defendant who committed murder when he was younger than 17. See *Brennan* v. *State*, 754 So. 2d 1, 5 (1999). By adopting the federal constitutional language, Florida voters effectively adopted our decision in *Stanford* v. *Kentucky*, 492 U. S. 361 (1989). See Weaver, Word May Allow Execution of 16-Year-Olds, Miami Herald, Nov. 7, 2002, p. 7B.

By contrast, only 2.1% of those sentenced to death between 1982 and 1988 committed the crimes when they were under 18. See *Stanford, supra,* at 373 (citing V. Streib, Imposition of Death Sentences for Juvenile Offenses, January 1, 1982, Through April 1, 1989, p. 2 (paper for Cleveland-Marshall College of Law, April 5, 1989)). As for actual executions of under-18 offenders, they constituted 2.4% of the total executions since 1973. Juvenile Death Penalty Today 4. In *Stanford,* we noted that only 2% of the executions between 1642 and 1986 were of under-18 offenders and found that that lower number did not demonstrate a national consensus against the penalty. 492 U. S., at 373–374 (citing V. Streib, Death Penalty for Juveniles 55, 57 (1987)). Thus, the numbers of under-18 offenders subjected to the death penalty, though low compared with adults, have either held steady or slightly increased since *Stanford.* These statistics in no way support the action the Court takes today.

II

Of course, the real force driving today's decision is not the actions of four state legislatures, but the Court's "'"own judgment"'" that murderers younger than 18 can never be as morally culpable as older counterparts. *Ante,* at 563 (quoting *Atkins,* 536 U. S., at 312 (in turn quoting *Coker,* 433 U. S., at 597 (plurality opinion))). The Court claims that this usurpation of the role of moral arbiter is simply a "retur[n] to the rul[e] established in decisions predating *Stanford,*" *ante,* at 563. That supposed rule—which is reflected solely in dicta and never once in a *holding* that purports to supplant the consensus of the American people with the Justices' views[7]—was repudiated in *Stanford* for the very good rea-

[7] See, *e. g., Enmund* v. *Florida,* 458 U. S. 782, 801 (1982) ("[W]e have no reason to disagree with th[e] judgment [of the state legislatures] for purposes of construing and applying the Eighth Amendment"); *Coker* v. *Georgia,* 433 U. S. 584, 597 (1977) (plurality opinion) ("[T]he legislative rejection of capital punishment for rape strongly confirms our own judgment").

son that it has no foundation in law or logic. If the Eighth Amendment set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of "the evolving standards of decency" of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation? [8]

The reason for insistence on legislative primacy is obvious and fundamental: "'[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'" *Gregg* v. *Georgia*, 428 U. S. 153, 175–176 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (quoting *Furman* v. *Georgia*, 408 U. S. 238, 383 (1972) (Burger, C. J., dissenting)). For a similar reason we have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries "'maintain a link between contemporary community values and the penal system'" that this Court cannot claim for itself. *Gregg*, *supra*, at 181 (quoting *Witherspoon* v. *Illinois*, 391 U. S. 510, 519, n. 15 (1968)).

Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death

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[8] JUSTICE O'CONNOR agrees with our analysis that no national consensus exists here, *ante*, at 594–598 (dissenting opinion). She is nonetheless prepared (like the majority) to override the judgment of America's legislatures if it contradicts her own assessment of "moral proportionality," *ante*, at 598. She dissents here only because it does not. The votes in today's case demonstrate that the offending of selected lawyers' moral sentiments is not a predictable basis for law—much less a democratic one.

penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding. As THE CHIEF JUSTICE has explained:

> "[M]ethodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results." *Atkins*, *supra*, at 326–327 (dissenting opinion) (citing R. Groves, Survey Errors and Survey Costs (1989); 1 C. Turner & E. Martin, Surveying Subjective Phenomena (1984)).

In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends. Cf. *Conroy* v. *Aniskoff*, 507 U. S. 511, 519 (1993) (SCALIA, J., concurring in judgment).

We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in *Hodgson* v. *Minnesota*, 497 U. S. 417 (1990), the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. Brief for APA as *Amicus Curiae*, O. T. 1989, No. 88–805 etc., p. 18. The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14–15) young people develop abilities similar to adults in reasoning

about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems." *Id.*, at 19–20 (citations omitted). Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one. Legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'" *McCleskey* v. *Kemp*, 481 U. S. 279, 319 (1987) (quoting *Gregg*, *supra*, at 186).

Even putting aside questions of methodology, the studies cited by the Court offer scant support for a categorical prohibition of the death penalty for murderers under 18. At most, these studies conclude that, *on average*, or *in most cases*, persons under 18 are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under 18 are unable to appreciate the nature of their crimes.

Moreover, the cited studies describe only adolescents who engage in risky or antisocial behavior, as many young people do. Murder, however, is more than just risky or antisocial behavior. It is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit premeditated murder are—at least sometimes—just as culpable as adults. Christopher Simmons, who was only seven months shy of his 18th birthday when he murdered Shirley Crook, described to his friends *beforehand*—"[i]n chilling, callous terms," as the Court puts it, *ante*, at 556—the murder he planned to commit. He then broke into the home of an innocent woman, bound her with duct tape and electrical wire, and threw her off a bridge alive and conscious. *Ante*, at 556–557. In their *amici* brief, the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia offer additional exam-

ples of murders committed by individuals under 18 that involve truly monstrous acts. In Alabama, two 17-year-olds, one 16-year-old, and one 19-year-old picked up a female hitchhiker, threw bottles at her, and kicked and stomped her for approximately 30 minutes until she died. They then sexually assaulted her lifeless body and, when they were finished, threw her body off a cliff. They later returned to the crime scene to mutilate her corpse. See Brief for Alabama et al. as *Amici Curiae* 9–10; see also *Loggins* v. *State*, 771 So. 2d 1070, 1074–1075 (Ala. Crim. App. 1999); *Duncan* v. *State*, 827 So. 2d 838, 840–841 (Ala. Crim. App. 1999). Other examples in the brief are equally shocking. Though these cases are assuredly the exception rather than the rule, the studies the Court cites in no way justify a constitutional imperative that prevents legislatures and juries from treating exceptional cases in an exceptional way—by determining that some murders are not just the acts of happy-go-lucky teenagers, but heinous crimes deserving of death.

That "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent," *ante*, at 569, is patently irrelevant—and is yet another resurrection of an argument that this Court gave a decent burial in *Stanford*. (What kind of Equal Justice under Law is it that—without so much as a "Sorry about that"—gives as the basis for sparing one person from execution arguments *explicitly rejected* in refusing to spare another?) As we explained in *Stanford*, 492 U. S., at 374, it is "absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards." Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another's life.

Moreover, the age statutes the Court lists "set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests." *Ibid.* The criminal justice system, by contrast, provides for individualized consideration of each defendant. In capital cases, this Court requires the sentencer to make an individualized determination, which includes weighing aggravating factors and mitigating factors, such as youth. See *Eddings*, 455 U. S., at 115–117. In other contexts where individualized consideration is provided, we have recognized that at least some minors will be mature enough to make difficult decisions that involve moral considerations. For instance, we have struck down abortion statutes that do not allow minors deemed mature by courts to bypass parental notification provisions. See, *e. g.*, *Bellotti* v. *Baird*, 443 U. S. 622, 643–644 (1979) (opinion of Powell, J.); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 74–75 (1976). It is hard to see why this context should be any different. Whether to obtain an abortion is surely a much more complex decision for a young person than whether to kill an innocent person in cold blood.

The Court concludes, however, *ante*, at 572–573, that juries cannot be trusted with the delicate task of weighing a defendant's youth along with the other mitigating and aggravating factors of his crime. This startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with "mak[ing] the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *McCleskey*, *supra*, at 311 (quoting H. Kalven & H. Zeisel, The American Jury 498 (1966)). The Court says, *ante*, at 573, that juries will be unable to appreciate the significance of a defendant's youth when faced with details of a brutal crime. This assertion is based on no evidence; to the contrary, the Court itself acknowledges that the execution of under-18 offenders is "infrequent" even in the States "with-

out a formal prohibition on executing juveniles," *ante*, at 564, suggesting that juries take seriously their responsibility to weigh youth as a mitigating factor.

Nor does the Court suggest a stopping point for its reasoning. If juries cannot make appropriate determinations in cases involving murderers under 18, in what other kinds of cases will the Court find jurors deficient? We have already held that no jury may consider whether a mentally deficient defendant can receive the death penalty, irrespective of his crime. See *Atkins*, 536 U. S., at 321. Why not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well? Surely jurors "overpower[ed]" by "the brutality or cold-blooded nature" of a crime, *ante*, at 573, could not adequately weigh these mitigating factors either.

The Court's contention that the goals of retribution and deterrence are not served by executing murderers under 18 is also transparently false. The argument that "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished," *ante*, at 571, is simply an extension of the earlier, false generalization that youth *always* defeats culpability. The Court claims that "juveniles will be less susceptible to deterrence," *ibid.*, because "'[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent,'" *ante*, at 572 (quoting *Thompson*, 487 U. S., at 837). The Court unsurprisingly finds no support for this astounding proposition, save its own case law. The facts of this very case show the proposition to be false. Before committing the crime, Simmons encouraged his friends to join him by assuring them that they could "get away with it" because they were minors. *State ex rel. Simmons* v. *Roper*, 112 S. W. 3d 397, 419 (Mo. 2003) (Price, J., dissenting). This fact may have influenced the jury's decision to impose capital punishment despite Simmons' age.

Because the Court refuses to entertain the possibility that its own unsubstantiated generalization about juveniles could be wrong, it ignores this evidence entirely.

III

Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.

The Court begins by noting that "Article 37 of the United Nations Convention on the Rights of the Child, [1577 U. N. T. S. 3, 28 I. L. M. 1448, 1468–1470, entered into force Sept. 2, 1990,] which every country in the world has ratified *save for the United States* and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18." *Ante*, at 576 (emphasis added). The Court also discusses the International Covenant on Civil and Political Rights (ICCPR), December 19, 1966, 999 U. N. T. S. 175, *ante*, at 567, 576, which the Senate ratified only subject to a reservation that reads:

> "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." Senate Committee on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102–23, p. 11 (1992).

Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position. That the Senate and the President—those actors our Constitution empowers to enter into treaties, see Art. II, §2—have declined to join and ratify treaties prohibiting

execution of under-18 offenders can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. That the reservation to the ICCPR was made in 1992 does not suggest otherwise, since the reservation still remains in place today. It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since "the punishment of life imprisonment without the possibility of parole is itself a severe sanction," *ante*, at 572, gives little comfort.

It is interesting that whereas the Court is not content to accept what the States of our Federal Union *say*, but insists on inquiring into what they *do* (specifically, whether they in fact *apply* the juvenile death penalty that their laws allow), the Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact *adheres* to a rule of no death penalty for offenders under 18. Nor does the Court inquire into how many of the countries that have the death penalty, but have forsworn (on paper at least) imposing that penalty on offenders under 18, have what no State of this country can constitutionally have: a *mandatory* death penalty for certain crimes, with no possibility of mitigation by the sentencing authority, for youth or any other reason. I suspect it is most of them. See, *e. g.*, R. Simon & D. Blaskovich, A Comparative Analysis of Capital Punishment: Statutes, Policies, Frequencies, and Public Attitudes the World Over 25, 26, 29 (2002). To forbid the death penalty for juveniles under such a system may be a good idea, but it says nothing about our system, in which the sentencing authority, typically a jury, always can, and almost

always does, withhold the death penalty from an under-18 offender except, after considering all the circumstances, in the rare cases where it is warranted. The foreign authorities, in other words, do not even speak to the issue before us here.

More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. The Court-pronounced exclusionary rule, for example, is distinctively American. When we adopted that rule in *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961), it was "unique to American jurisprudence." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 415 (1971) (Burger, C. J., dissenting). Since then a categorical exclusionary rule has been "universally rejected" by other countries, including those with rules prohibiting illegal searches and police misconduct, despite the fact that none of these countries "appears to have any alternative form of discipline for police that is effective in preventing search violations." Bradley, *Mapp* Goes Abroad, 52 Case W. Res. L. Rev. 375, 399–400 (2001). England, for example, rarely excludes evidence found during an illegal search or seizure and has only recently begun excluding evidence from illegally obtained confessions. See C. Slobogin, Criminal Procedure: Regulation of Police Investigation 550 (3d ed. 2002). Canada rarely excludes evidence and will only do so if admission will "bring the administration of justice into disrepute." *Id.*, at 550–551 (internal quotation marks omitted). The European Court of Human Rights has held that introduction of illegally seized evidence does not violate the "fair trial" requirement in Article 6, § 1, of the European Convention on

Human Rights. See Slobogin, *supra*, at 551; Bradley, *supra*, at 377–378.

The Court has been oblivious to the views of other countries when deciding how to interpret our Constitution's requirement that "Congress shall make no law respecting an establishment of religion . . . ." Amdt. 1. Most other countries—including those committed to religious neutrality—do not insist on the degree of separation between church and state that this Court requires. For example, whereas "we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 842 (1995) (citing cases), countries such as the Netherlands, Germany, and Australia allow direct government funding of religious schools on the ground that "the state can only be truly neutral between secular and religious perspectives if it does not dominate the provision of so key a service as education, and makes it possible for people to exercise their right of religious expression within the context of public funding." S. Monsma & J. Soper, The Challenge of Pluralism: Church and State in Five Democracies 207 (1997); see also *id.*, at 67, 103, 176. England permits the teaching of religion in state schools. *Id.*, at 142. Even in France, which is considered "America's only rival in strictness of church-state separation," "[t]he practice of contracting for educational services provided by Catholic schools is very widespread." C. Glenn, The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies 110 (2000).

And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. See Larsen, Importing Constitutional Norms from a "Wider Civilization": *Lawrence* and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 Ohio St. L. J. 1283, 1320 (2004); Center for Reproduc-

tive Rights, The World's Abortion Laws (June 2004), http://www.reproductiverights.org/pub_fac_abortion_laws.html. Though the Government and *amici* in cases following *Roe* v. *Wade*, 410 U. S. 113 (1973), urged the Court to follow the international community's lead, these arguments fell on deaf ears. See McCrudden, A Part of the Main? The Physician-Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court, in Law at the End of Life: The Supreme Court and Assisted Suicide 125, 129–130 (C. Schneider ed. 2000).

The Court's special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion. It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought. If we applied that approach today, our task would be an easy one. As we explained in *Harmelin* v. *Michigan*, 501 U. S. 957, 973–974 (1991), the "Cruell and Unusuall Punishments" provision of the English Declaration of Rights was originally meant to describe those punishments "'out of [the Judges'] Power'"—that is, those punishments that were not authorized by common law or statute, but that were nonetheless administered by the Crown or the Crown's judges. Under that reasoning, the death penalty for under-18 offenders would easily survive this challenge. The Court has, however—I think wrongly—long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation's *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental

jurists—a legal, political, and social culture quite different from our own. If we took the Court's directive seriously, we would also consider relaxing our double jeopardy prohibition, since the British Law Commission recently published a report that would significantly extend the rights of the prosecution to appeal cases where an acquittal was the result of a judge's ruling that was legally incorrect. See Law Commission, Double Jeopardy and Prosecution Appeals, LAW COM No. 267, Cm 5048, p. 6, ¶ 1.19 (Mar. 2001); J. Spencer, The English System in European Criminal Procedures 142, 204, and n. 239 (M. Delmas-Marty & J. Spencer eds. 2002). We would also curtail our right to jury trial in criminal cases since, despite the jury system's deep roots in our shared common law, England now permits all but the most serious offenders to be tried by magistrates without a jury. See D. Feldman, England and Wales, in Criminal Procedure: A Worldwide Study 91, 114–115 (C. Bradley ed. 1999).

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.[9]

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[9] JUSTICE O'CONNOR asserts that the Eighth Amendment has a "special character," in that it "draws its meaning directly from the maturing values of civilized society." *Ante*, at 604–605. Nothing in the text reflects such a distinctive character—and we have certainly applied the "maturing values" rationale to give brave new meaning to other provisions of the Constitution, such as the Due Process Clause and the Equal Protection Clause. See, *e. g.*, *Lawrence* v. *Texas*, 539 U. S. 558, 571–573 (2003); *United States* v. *Virginia*, 518 U. S. 515, 532–534 (1996); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 847–850 (1992). JUSTICE O'CONNOR asserts that an international consensus can at least "serve to confirm the reasonableness of a consonant and genuine American consensus." *Ante*, at 605. Surely not unless it can also demonstrate the *un*reasonableness of such a consensus. Either America's principles are its own, or they follow the world; one cannot have it both ways. Finally, JUSTICE O'CONNOR finds it unnecessary to consult foreign law in the present case because

The Court responds that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Ante*, at 578. To begin with, I do not believe that approval by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment. More importantly, however, the Court's statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited *to set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today.

IV

To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its

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there is "no . . . domestic consensus" to be confirmed. *Ibid.* But since she believes that the Justices can announce their own requirements of "moral proportionality" despite the absence of consensus, why would foreign law not be relevant to *that* judgment? If foreign law is powerful enough to supplant the judgment of the American people, surely it is powerful enough to change a personal assessment of moral proportionality.

flagrant disregard of our precedent in *Stanford*. Until today, we have always held that "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997). That has been true even where "'changes in judicial doctrine' ha[ve] significantly undermined" our prior holding, *United States* v. *Hatter*, 532 U. S. 557, 567 (2001) (quoting *Hatter* v. *United States*, 64 F. 3d 647, 650 (CA Fed. 1995)), and even where our prior holding "appears to rest on reasons rejected in some other line of decisions," *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). Today, however, the Court silently approves a state-court decision that blatantly rejected controlling precedent.

One must admit that the Missouri Supreme Court's action, and this Court's indulgent reaction, are, in a way, understandable. In a system based upon constitutional and statutory text democratically adopted, the concept of "law" ordinarily signifies that particular words have a fixed meaning. Such law does not change, and this Court's pronouncement of it therefore remains authoritative until (confessing our prior error) we overrule. The Court has purported to make of the Eighth Amendment, however, a mirror of the passing and changing sentiment of American society regarding penology. The lower courts can look into that mirror as well as we can; and what we saw 15 years ago bears no necessary relationship to what they see today. Since they are not looking at the same text, but at a different scene, why should our earlier decision control their judgment?

However sound philosophically, this is no way to run a legal system. We must disregard the new reality that, to the extent our Eighth Amendment decisions constitute something more than a show of hands on the current Justices' current personal views about penology, they purport to be nothing more than a snapshot of American public opinion at a particular point in time (with the timeframes now shortened to a mere 15 years). We must treat these deci-

sions just as though they represented *real* law, real prescriptions democratically adopted by the American people, as conclusively (rather than sequentially) construed by this Court. Allowing lower courts to reinterpret the Eighth Amendment whenever they decide enough time has passed for a new snapshot leaves this Court's decisions without any force—especially since the "evolution" of our Eighth Amendment is no longer determined by objective criteria. To allow lower courts to behave as we do, "updating" the Eighth Amendment as needed, destroys stability and makes our case law an unreliable basis for the designing of laws by citizens and their representatives, and for action by public officials. The result will be to crown arbitrariness with chaos.

Syllabus

CHEROKEE NATION OF OKLAHOMA ET AL. *v.* LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 02–1472. Argued November 9, 2004—Decided March 1, 2005*

The Indian Self-Determination and Education Assistance Act (Act) authorizes the Government and Indian tribes to enter into contracts in which tribes promise to supply federally funded services that a Government agency normally would provide, 25 U. S. C. § 450f(a); and requires the Government to pay, *inter alia*, a tribe's "contract support costs," which are "reasonable costs" that a federal agency would not have incurred, but which the tribe would incur in managing the program, § 450j–1(a)(2). Here, each Tribe agreed to supply health services normally provided by the Department of Health and Human Services' Indian Health Service, and the contracts included an annual funding agreement with a Government promise to pay contract support costs. In each instance, the Government refused to pay the full amount promised because Congress had not appropriated sufficient funds. In the first case, the Tribes submitted administrative payment claims under the Contract Disputes Act of 1978, which the Department of the Interior (the appropriations manager) denied. They then brought a breach-of-contract action. The District Court found against them, and the Tenth Circuit affirmed. In the second case, the Cherokee Nation submitted claims to the Department of the Interior, which the Board of Contract Appeals ordered paid. The Federal Circuit affirmed.

Held: The Government is legally bound to pay the "contract support costs" at issue. Pp. 636–647.

(a) The Government argues that it is legally bound by its promises to pay the relevant costs only if Congress appropriated sufficient funds, which the Government contends Congress did not do in this instance. It does not deny that it promised, but failed, to pay the costs; that, were these ordinary procurement contracts, its promises to pay would be legally binding; that each year Congress appropriated more than the amounts at issue; that those appropriations Acts had no relevant statu-

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*Together with No. 03–853, *Leavitt, Secretary of Health and Human Services* v. *Cherokee Nation of Oklahoma*, on certiorari to the United States Court of Appeals for the Federal Circuit.

tory restrictions; that where Congress makes such appropriations, a clear inference arises that it does not intend to impose legally binding restrictions; and that as long as Congress has appropriated sufficient legally unrestricted funds to pay contracts, as it did here, the Government normally cannot back out of a promise to pay on grounds of insufficient appropriations. Thus, in order to show that its promises were not legally binding, the Government must show something special about the promises at issue. It fails to do so here. Pp. 636–638.

(b) The Act does not support the Government's initial argument that, because the Act creates a special contract with a unique nature differentiating it from standard Government procurement contracts, a tribe should bear the risk that a lump-sum appropriation will be insufficient to pay its contract. In general, the Act's language runs counter to this view, strongly suggesting instead that Congress, *in respect to a promise's binding nature,* meant to treat alike promises made under the Act and ordinary contractual promises. The Act uses "contract" 426 times to describe the nature of the Government's promise, and "contract" normally refers to "a promise . . . for the breach of which the law gives a remedy, or the performance of which the law . . . recognizes as a duty," Restatement (Second) of Contracts § 1. Payment of contract support costs is described in a provision containing a sample "Contract," 25 U. S. C. § 450*l*(c), and contractors are entitled to "money damages" under the Contract Disputes Act if the Government refuses to pay, § 450m–1(a). Nor do the Act's general purposes support any special treatment. The Government points to the statement that tribes need not spend funds "in excess of the amount of funds awarded," § 450*l*(c), but that kind of statement often appears in procurement contracts; and the statement that "no [self-determination] contract . . . shall be construed to be a procurement contract," § 450b(j), in context, seems designed to relieve tribes and the Government of technical burdens that may accompany procurement, not to weaken a contract's binding nature. Pp. 638–640.

(c) Neither of the phrases in an Act proviso renders the Government's promise nonbinding. One phrase—"the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe," § 450j–1(b)—did not make the Government's promise nonbinding, since the relevant appropriations contained unrestricted funds sufficient to pay the claims at issue. When this happens in an ordinary procurement contract case, the Government admits that the contractor is entitled to payment even if the agency has allocated the funds to another purpose. That the Government used the unrestricted funds to satisfy important needs—*e. g.,* the cost of running the Indian Health Service—does not matter, for there is nothing special in the Act's language or the contracts to convince the

Syllabus

Court that anything but the ordinary rule applies here. The other proviso phrase—which subjects the Government's provision of funds under the Act "to the availability of appropriations," *ibid.*—also fails to help the Government. Congress appropriated adequate unrestricted funds here, and the Government provides no convincing argument for a special, rather than ordinary, interpretation of the phrase. Legislative history shows only that Executive Branch officials wanted discretionary authority to allocate a lump-sum appropriation too small to pay for all contracts, not that Congress granted such authority. And other statutory provisions, *e. g.*, § 450j–1(c)(2), to which the Government points, do not provide sufficient support. Pp. 640–645.

(d) Finally, the Government points to § 314 of the later-enacted 1999 Appropriations Act, which states that amounts "earmarked in committee reports for the . . . Indian Health Service . . . for payments to tribes . . . for contract support costs . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes." The Court rejects the Government's claims that this statute merely clarifies earlier ambiguous appropriations language that was wrongly read as unrestricted. Earlier appropriations statutes were not ambiguous, and restrictive language in Committee Reports is not legally binding. Because no other restrictive language exists, the earlier statutes unambiguously provided unrestricted lump-sum appropriations. Nor should § 314 be interpreted to retroactively bar payment of claims arising under 1994 through 1997 contracts. That would raise serious constitutional issues by undoing binding governmental contractual obligations. Thus, the Court adopts the interpretation that Congress intended to forbid the Indian Health Service to use unspent appropriated funds to pay unpaid contract support costs. So interpreted, § 314 does not bar recovery here. Pp. 645–647.

No. 02–1472, 311 F. 3d 1054, reversed; No. 03–853, 334 F. 3d 1075, affirmed; and both cases remanded.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in part, *post*, p. 647. REHNQUIST, C. J., took no part in the decision of the cases.

Lloyd B. Miller argued the cause for petitioners in No. 02–1472 and respondent in No. 03–853. With him on the briefs were *Arthur Lazarus, Jr., Harry R. Sachse, William R. Perry, Carter G. Phillips,* and *Stephen B. Kinnaird.*

Sri Srinivasan argued the cause for the federal parties in both cases. With him on the brief were *Acting Solicitor General Clement, Assistant Attorney General Keisler, Deputy Solicitor General Kneedler, Barbara C. Biddle, Jeffrica Jenkins Lee,* and *Alex M. Azar II.*†

JUSTICE BREYER delivered the opinion of the Court.

The United States and two Indian Tribes have entered into agreements in which the Government promises to pay certain "contract support costs" that the Tribes incurred during fiscal years (FYs) 1994 through 1997. The question before us is whether the Government's promises are legally binding. We conclude that they are.

I

The Indian Self-Determination and Education Assistance Act (Act), 88 Stat. 2203, as amended, 25 U. S. C. § 450 *et seq.* (2000 ed. and Supp. II), authorizes the Government and Indian tribes to enter into contracts in which the tribes promise to supply federally funded services, for example tribal health services, that a Government agency would otherwise provide. See § 450f(a); see also § 450a(b). The Act specifies that the Government must pay a tribe's costs, including administrative expenses. See §§ 450j–1(a)(1) and (2). Administrative expenses include (1) the amount that the agency would have spent "for the operation of the progra[m]" had the agency itself managed the program, § 450j–1(a)(1),

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†Briefs of *amici curiae* urging reversal in No. 02–1472 and affirmance in No. 03–853 were filed for the National Congress of American Indians by *Edward C. DuMont;* and for the Tunica-Biloxi Tribe of Louisiana by *Michael P. Gross* and *C. Bryant Rogers. Ian Heath Gershengorn, Donald B. Verrilli, Jr., Herbert L. Fenster,* and *Robin S. Conrad* filed a brief for the Chamber of Commerce of the United States of America et al. as *amici curiae* urging affirmance in No. 03–853.

Geoffrey D. Strommer, Joseph H. Webster, and *Charles A. Hobbs* filed a brief for the Seldovia Village Tribe as *amicus curiae.*

and (2) "contract support costs," the costs at issue here. § 450j–1(a)(2).

The Act defines "contract support costs" as other "reasonable costs" that a federal agency would not have incurred, but which nonetheless "a tribal organization" acting "as a contractor" would incur "to ensure compliance with the terms of the contract and prudent management." *Ibid.* "[C]ontract support costs" can include indirect administrative costs, such as special auditing or other financial management costs, § 450j–1(a)(3)(A)(ii); they can include direct costs, such as workers' compensation insurance, § 450j–1(a)(3)(A)(i); and they can include certain startup costs, § 450j–1(a)(5). Most contract support costs are indirect costs "generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe." Brief for Federal Parties 7; see 25 U. S. C. §§ 450b(f)–(g).

The first case before us concerns Shoshone-Paiute contracts for FYs 1996 and 1997 and a Cherokee Nation contract for 1997. The second case concerns Cherokee Nation contracts for FYs 1994, 1995, and 1996. In each contract, the Tribe agreed to supply health services that a Government agency, the Indian Health Service, would otherwise have provided. See, *e. g.*, App. 88–92 (Shoshone-Paiute Tribal Health Compact), 173–175 (Compact between the United States and the Cherokee Nation). Each contract included an "Annual Funding Agreement" with a Government promise to pay contract support costs. See, *e. g.*, *id.*, at 104–128, 253–264. In each instance, the Government refused to pay the full amount promised because, the Government says, Congress did not appropriate sufficient funds.

Both cases began as administrative proceedings. In the first case, the Tribes submitted claims seeking payment under the Contract Disputes Act of 1978, 92 Stat. 2383, 41 U. S. C. § 601 *et seq.*, and the Act, 25 U. S. C. §§ 450m–1(a), (d), 458cc(h), from the Department of the Interior (which manages the relevant appropriations). See, *e. g.*, App. 150–

151, 201–203. The Department denied their claim; they then brought a breach-of-contract action in the Federal District Court for the Eastern District of Oklahoma seeking $3.5 million (Shoshone-Paiute) and $3.4 million (Cherokee Nation). See *Cherokee Nation of Okla.* v. *Thompson*, 311 F. 3d 1054, 1059 (CA10 2002). The District Court found against the Tribes. *Cherokee Nation of Okla.* v. *United States*, 190 F. Supp. 2d 1248 (ED Okla. 2001). And the Court of Appeals for the Tenth Circuit affirmed. 311 F. 3d 1054 (2002).

In the second case, the Cherokee Nation submitted claims to the Department of the Interior. See App. 229–230. A contracting officer denied the claims; the Board of Contract Appeals reversed this ruling, ordering the Government to pay $8.5 million in damages. *Cherokee Nation of Okla.*, 1999–2 BCA ¶ 30,462, p. 150488; App. to Pet. for Cert. in No. 03–853, pp. 38a–40a. The Government sought judicial review in the Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the Board's determination for the Tribe. *Thompson* v. *Cherokee Nation of Okla.*, 334 F. 3d 1075 (2003).

In light of the identical nature of the claims in the two cases and the opposite results that the two Courts of Appeals have reached, we granted certiorari. We now affirm the Federal Circuit's judgment in favor of the Cherokee Nation, and we reverse the Tenth Circuit's judgment in favor of the Government.

II

The Government does not deny that it promised to pay the relevant contract support costs. Nor does it deny that it failed to pay. Its sole defense consists of the argument that it is legally bound by its promises if, and only if, Congress appropriated sufficient funds, and that, in this instance, Congress failed to do so.

The Government in effect concedes yet more. It does not deny that, *were these contracts ordinary procurement contracts*, its promises to pay would be legally binding. The

Tribes point out that each year Congress appropriated far more than the amounts here at issue (between $1.277 billion and $1.419 billion) for the Indian Health Service "to carry out," *inter alia*, "the Indian Self-Determination Act." See 107 Stat. 1408 (1993); 108 Stat. 2527–2528 (1994); 110 Stat. 1321–189 (1996); *id.*, at 3009–212 to 3009–213. These appropriations Acts contained no relevant statutory restriction.

The Tribes (and their *amici*) add, first, that this Court has said that

> "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency." *Lincoln* v. *Vigil*, 508 U. S. 182, 192 (1993) (internal quotation marks omitted).

See also *International Union, United Auto., Aerospace & Agricultural Implement Workers of America* v. *Donovan*, 746 F. 2d 855, 860–861 (CADC 1984) (Scalia, J.); *Blackhawk Heating & Plumbing Co.* v. *United States*, 224 Ct. Cl. 111, 135, and n. 9, 622 F. 2d 539, 552, and n. 9 (1980).

The Tribes and their *amici* add, second, that as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of "insufficient appropriations," even if the contract uses language such as "subject to the availability of appropriations," and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made. See *Ferris* v. *United States*, 27 Ct. Cl. 542, 546 (1892) ("A contractor who is one of several persons to be paid out

of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects"); see also *Blackhawk*, *supra*, at 135, and n. 9, 622 F. 2d, at 552, and n. 9.

As we have said, the Government denies none of this. Thus, if it is nonetheless to demonstrate that its promises were not legally binding, it must show something special about the promises here at issue. That is precisely what the Government here tries, but fails, to do.

A

The Government initially argues that the Act creates a special kind of "self-determination contrac[t]" with a "unique, government-to-government nature" that differentiates it from "standard government procurement contracts." Brief for Federal Parties 4. Because a tribe does not bargain with the Government at arm's length, *id.*, at 24, the law should charge it with knowledge that the Government has entered into other, similar contracts with other tribes; the tribe should bear the risk that a total lump-sum appropriation (though sufficient to cover its own contracts) will not prove sufficient to pay *all* similar contracts, *id.*, at 23–25. Because such a tribe has elected to "ste[p] into the shoes of a federal agency," *id.*, at 25, the law should treat it like an agency; and an agency enjoys no legal entitlement to receive promised amounts from Congress, *id.*, at 24–25. Rather, a tribe should receive only the portion of the total lump-sum appropriation allocated to it, not the entire sum to which a private contractor might well be entitled. *Id.*, at 24.

The Government finds support for this special treatment of its promises made pursuant to the Act by pointing to a statutory provision stating that "'no [self-determination] contract . . . shall be construed to be a procurement contract,'" *id.*, at 23 (quoting 25 U. S. C. § 450b(j); alterations in original). It finds supplementary support in another provi-

sion that says that a tribe need not deliver services "'in excess of the amount of funds awarded,'" Brief for Federal Parties 24 (quoting 25 U. S. C. § 450*l*(c); citing § 458aaa–7(k)).

These statutory provisions, in our view, fall well short of providing the support the Government needs. In general, the Act's language runs counter to the Government's view. That language strongly suggests that Congress, *in respect to the binding nature of a promise*, meant to treat alike promises made under the Act and ordinary contractual promises (say, those made in procurement contracts). The Act, for example, uses the word "contract" 426 times to describe the nature of the Government's promise; and the word "contract" normally refers to "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty," Restatement (Second) of Contracts § 1 (1979). The Act also describes payment of contract support costs in a provision setting forth a sample "Contract." 25 U. S. C. § 450*l*(c) (Model Agreement §§ 1(a)(1), (b)(4)). Further, the Act says that if the Government refuses to pay, then contractors are entitled to "money damages" in accordance with the Contract Disputes Act. 25 U. S. C. § 450m–1(a); see also §§ 450m–1(d), 458cc(h).

Neither do the Act's general purposes support any special treatment. The Act seeks greater tribal self-reliance brought about through more "effective and meaningful participation by the Indian people" in, and less "Federal domination" of, "programs for, and services to, Indians." § 450a(b). The Act also reflects a congressional concern with Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future. See, *e. g.*, § 450j–1(g); see also §§ 450j–1(a), (d)(2).

The specific statutory language to which the Government points—stating that tribes need not spend funds "in excess of the amount of funds awarded," § 450*l*(c) (Model Agreement

§ 1(b)(5))—does not help the Government. Cf. Brief for Federal Parties 18. This kind of statement often appears in ordinary procurement contracts. See, *e. g.*, 48 CFR § 52.232–20(d)(2) (2004) (sample "Limitation of Cost" clause); see generally W. Keyes, Government Contracts Under the Federal Acquisition Regulation § 32.38, p. 724 (3d ed. 2003). Nor can the Government find adequate support in the statute's statement that "no [self-determination] contract . . . shall be construed to be a procurement contract." 25 U. S. C. § 450b(j). In context, that statement seems designed to relieve tribes and the Government of the technical burdens that often accompany procurement, not to weaken a contract's binding nature. Cf. 41 CFR § 3–4.6001 (1976) (applying procurement rules to tribal contracts); S. Rep. No. 100–274, p. 7 (1987) (noting that application of procurement rules to contracts with tribes "resulted in excessive paperwork and unduly burdensome reporting requirements"); *id.*, at 18–19 (describing decision not to apply procurement rules to tribal contracts as intended to "greatly reduc[e]" the federal bureaucracy associated with them). Finally, we have found no indication that Congress believed or accepted the Government's current claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors. Compare Brief for Federal Parties 23–24 with *Ferris*, 27 Ct. Cl., at 546.

B

The Government next points to an Act proviso, which states:

> "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is [1] *subject to the availability of appropriations* and the Secretary [2] is *not required to reduce funding for programs, projects, or activities serving a tribe to make*

> *funds available to another tribe* or tribal organization under this subchapter." 25 U. S. C. §450j–1(b) (emphasis and bracketed numbers added).

The Government believes that the two italicized phrases, taken separately or together, render its promises nonbinding.

1

We begin with phrase [2]. This phrase, says the Government, makes nonbinding a promise to pay one tribe's costs where doing so would require funds that the Government would otherwise devote to "programs, projects, or activities serving . . . another tribe," *ibid.* See Brief for Federal Parties 27–36. This argument is inadequate, however, for at the least it runs up against the fact—found by the Federal Circuit, see 334 F. 3d, at 1093–1094, and nowhere here denied—that the relevant congressional appropriations contained *other* unrestricted funds, small in amount but sufficient to pay the claims at issue. And as we have said, *supra*, at 636–638, the Government itself tells us that, in the case of ordinary contracts, say, procurement contracts,

> "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to another purpose* or assumes other obligations that exhaust the funds." Brief for Federal Parties 23 (emphasis added).

See, *e. g.*, *Lincoln*, 508 U. S., at 192; *Blackhawk*, 224 Ct. Cl., at 135, and n. 9, 622 F. 2d, at 552, and n. 9; *Ferris*, *supra*, at 546.

The Government argues that these other funds, though legally unrestricted (as far as the appropriations statutes' language is concerned), were nonetheless unavailable to pay "contract support costs" because the Government had to use those funds to satisfy a critically important need, namely, to pay the costs of "inherent federal functions," such as the cost

of running the Indian Health Service's central Washington office. Brief for Federal Parties 9–10, 27–34. This argument cannot help the Government, however, for it amounts to no more than a claim that the agency has allocated the funds to another purpose, albeit potentially a very important purpose. If an important alternative need for funds cannot rescue the Government from the binding effect of its promises where ordinary procurement contracts are at issue, it cannot rescue the Government here, for we can find nothing special in the statute's language or in the contracts.

The Government's best effort to find something special in the statutory language is unpersuasive. The Government points to language that forbids the Government to enter into a contract with a tribe in which it promises to pay the tribe for performing federal functions. See 25 U. S. C. § 458aaa–6(c)(1)(A)(ii); see also §§ 450f(a)(2)(E), 450j–1(a)(1), 450*l*(c) (Model Agreement § 1(a)(2)). Language of this kind, however, which forbids the Government to contract for certain kinds of services, says nothing about the *source* of funds used to pay for the supply of contractually legitimate activities (and that is what is at issue here).

We recognize that agencies may sometimes find that they must spend unrestricted appropriated funds to satisfy needs they believe more important than fulfilling a contractual obligation. But the law normally expects the Government to avoid such situations, for example, by refraining from making less essential contractual commitments; or by asking Congress in advance to protect funds needed for more essential purposes with *statutory* earmarks; or by seeking added funding from Congress; or, if necessary, by using unrestricted funds for the more essential purpose while leaving the contractor free to pursue appropriate legal remedies arising because the Government broke its contractual promise. See *New York Airways, Inc.* v. *United States*, 177 Ct. Cl. 800, 808–811, 369 F. 2d 743, 747–748 (1966) *(per curiam)*; 31 U. S. C. §§ 1341(a)(1)(A) and (B) (Anti-Deficiency Act); 41

U. S. C. § 601 *et seq.* (Contract Disputes Act); 31 U. S. C. § 1304 (Judgment Fund); see generally 2 General Accounting Office, Principles of Federal Appropriations Law 6–17 to 6–19 (2d ed. 1992) (hereinafter GAO Redbook). The Government, without denying that this is so as a general matter of procurement law, says nothing to convince us that a different legal rule should apply here.

2

Phrase [1] of the proviso says that the Government's provision of funds under the Act is "subject to the availability of appropriations." 25 U. S. C. § 450j–1(b). This language does not help the Government either. Language of this kind is often used with respect to Government contracts. See, *e. g.*, 22 U. S. C. § 2716(a)(1); 42 U. S. C. §§ 6249(b)(4), 12206(d)(1). This kind of language normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year. See, *e. g.*, *Blackhawk*, *supra*, at 133–138, 622 F. 2d, at 551–553; see generally 1 GAO Redbook 4–6 (3d ed. 2004); 2 *id.*, at 6–6 to 6–8, 6–17 to 6–19 (2d ed. 1992). It also makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations. See *Ferris*, 27 Ct. Cl., at 546; *New York Airways*, *supra*, at 809–813, 369 F. 2d, at 748–749; *Dougherty* v. *United States*, 18 Ct. Cl. 496, 503 (1883); 31 U. S. C. §§ 1341(a)(1)(A) and (B) (providing that without some such special authority, a contracting officer cannot bind the Government in the absence of an appropriation). Since Congress appropriated adequate unrestricted funds here, phrase [1], if interpreted as ordinarily understood, would not help the Government.

The Government again argues for a special interpretation. It says the language amounts to "an affirmative *grant* of au-

thority to the Secretary to adjust funding levels based on appropriations." Brief for Federal Parties 41 (emphasis in original). In so arguing, the Government in effect claims (on the basis of this language) to have the legal right to disregard its contractual promises if, for example, it reasonably finds other, more important uses for an otherwise adequate lump-sum appropriation.

In our view, however, the Government must again shoulder the burden of explaining why, in the context of Government contracts, we should not give this kind of statutory language its ordinary contract-related interpretation, at least in the absence of a showing that Congress meant the contrary. We believe it important to provide a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services. See, *e. g.*, *Franconia Associates* v. *United States*, 536 U. S. 129, 142 (2002); *United States* v. *Winstar Corp.*, 518 U. S. 839, 884–885, and n. 29 (1996) (plurality opinion); *id.*, at 913 (BREYER, J., concurring); *Lynch* v. *United States*, 292 U. S. 571, 580 (1934). The Government, in our view, has provided no convincing argument for a special, rather than ordinary, interpretation here.

The Government refers to legislative history, see Brief for Federal Parties 41–42 (citing, *e. g.*, S. Rep. No. 100–274, at 48, 57), but that history shows only that Executive Branch officials would have liked to exercise discretionary authority to allocate a lump-sum appropriation too small to pay for all the contracts that the Government had entered into; the history does not show that Congress granted such authority. Nor can we find sufficient support in the other statutory provisions to which the Government points. See 25 U. S. C. § 450j–1(c)(2) (requiring the Government to report underpayments of promised contract support costs); 107 Stat. 1408 (Appropriations Act for FY 1994) (providing that $7.5 million

for contract support costs in "initial or expanded" contracts "shall remain available" until expended); 108 Stat. 2528 (same for FY 1995); 110 Stat. 1321–189 (same for FY 1996); *id.*, at 3009–213 (same for FY 1997). We cannot adopt the Government's special interpretation of phrase [1] of the proviso.

C

Finally, the Government points to a later enacted statute, § 314 of the Department of the Interior and Related Agencies Appropriations Act, 1999, which says:

> "Notwithstanding any other provision of law [the] amounts appropriated to or *earmarked in committee reports* for the . . . Indian Health Service . . . for payments to tribes . . . for contract support costs . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes." 112 Stat. 2681–288 (emphasis added).

See Brief for Federal Parties 45–50. The Government adds that congressional Committee Reports "earmarked," *i. e.*, restricted, appropriations available to pay "contract support costs" in each of FYs 1994 through 1997. *Id.*, at 48. And those amounts have long since been spent. See *id.*, at 12. Since those amounts "are the total amounts available for" payment of "contract support costs," the Government says, it is unlawful to pay the Tribes' claims. *Id.*, at 45–48.

The language in question is open to the interpretation that it retroactively bars payment of claims arising under 1994 through 1997 contracts. It is also open to another interpretation. Just prior to Congress' enactment of § 314, the Interior Department's Board of Contract Appeals considered a case similar to the present ones and held that the Government was legally bound to pay amounts it had promised in similar contracts. *Alamo Navajo School Bd., Inc. and Miccosukee Corp.*, 1998–2 BCA ¶ 29,831, p. 147681 (1997), and ¶ 29,832, p. 147699 (1998). The Indian Health Service contemporaneously issued a draft document that suggested the

use of unspent funds appropriated in prior years to pay unpaid "contract support costs." App. 206–209. Indeed, the document referred to use of unobligated funds from years including 1994 through 1997 to pay "contract support cost" debts. *Id.*, at 206–207. Section 314's language may be read as simply forbidding the Service to use those leftover funds for that purpose.

On the basis of language alone we would find either interpretation reasonable. But there are other considerations. The first interpretation would undo a binding governmental contractual promise. A statute that retroactively repudiates the Government's contractual obligation may violate the Constitution. See, *e. g.*, *Winstar*, *supra*, at 875–876 (plurality opinion); *Perry* v. *United States*, 294 U. S. 330, 350–351 (1935); *Lynch*, *supra*, at 579–580; *United States* v. *Klein*, 13 Wall. 128, 144–147 (1872); see also, *e. g.*, *Winstar*, *supra*, at 884–885, and n. 29 (plurality opinion) (describing practical disadvantages flowing from governmental repudiation); *Lynch*, *supra*, at 580 (same). And such an interpretation is disfavored. See *Clark* v. *Martinez*, *ante*, at 380–382; *Zadvydas* v. *Davis*, 533 U. S. 678, 689 (2001); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). This consideration tips the balance against the retroactive interpretation.

The Government, itself not relying on either interpretation, offers us a third. It says that the statute simply clarifies earlier ambiguous appropriations language that was wrongly read as unrestricted. Brief for Federal Parties 48 (citing *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969)). The earlier appropriations statutes, however, were not ambiguous. The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding. See, *e. g.*, *Lincoln*, 508 U. S., at 192; *International Union*, 746 F. 2d, at 860–861; *Blackhawk*, 224 Ct. Cl., at 135, and n. 9, 622 F. 2d, at 552, and n. 9. No other restrictive language exists. The earlier appropriations stat-

utes unambiguously provided unrestricted lump-sum appropriations. We therefore cannot accept the Government's interpretation of § 314.

Hence we, like the Federal Circuit, are left with the second interpretation, which we adopt, concluding that Congress intended it in the circumstances. See *Zadvydas*, *supra*, at 689; cf. 334 F. 3d, at 1092. So interpreted, the provision does not bar recovery here.

For these reasons, we affirm the judgment of the Federal Circuit; we reverse the judgment of the Tenth Circuit; and we remand the cases for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of these cases.

JUSTICE SCALIA, concurring in part.

I join the Court's opinion except its reliance, *ante*, at 640, on a Senate Committee Report to establish the meaning of the statute at issue here. That source at most indicates the intent of one Committee of one Chamber of Congress—and realistically, probably not even that, since there is no requirement that Committee members vote on, and small probability that they even read, the entire text of a staff-generated report. It is a legal fiction to say that this expresses the intent of the United States Congress. And it is in any event not the inadequately expressed intent of the Congress, but the meaning of what it enacted, that we should be looking for. The only virtue of this cited source (and its entire allure) is that it says precisely what the Court wants.

REPORTER'S NOTE

The next page is purposely numbered 801. The numbers between 647 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR OCTOBER 4, 2004, THROUGH MARCH 1, 2005

OCTOBER 4, 2004

Certiorari Granted—Vacated and Remanded

No. 03–1540. LAFONTAINE, AKA FROMME *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crawford* v. *Washington*, 541 U. S. 36 (2004). Reported below: 87 Fed. Appx. 776.

No. 03–9851. VARACALLI *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crawford* v. *Washington*, 541 U. S. 36 (2004). Reported below: 85 Fed. Appx. 242.

No. 03–10242. WEDGEWORTH *v.* KANSAS. Ct. App. Kan. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crawford* v. *Washington*, 541 U. S. 36 (2004). Reported below: 32 Kan. App. 2d xliii, 79 P. 3d 795.

No. 03–10328. HINES *v.* JOHNSON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Nelson* v. *Campbell*, 541 U. S. 637 (2004). Reported below: 83 Fed. Appx. 592.

No. 03–10835. SARR *v.* WYOMING. Sup. Ct. Wyo. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crawford* v. *Washington*, 541 U. S. 36 (2004). Reported below: 85 P. 3d 439.

No. 04–5098. CALCANO *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Crawford* v. *Washington*, 541 U. S. 36 (2004). Reported below: 83 Fed. Appx. 384.

Certiorari Dismissed

No. 03–10280. SMITH *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 03–10506. BROOKS *v.* GEORGIA BOARD OF PARDONS AND PAROLES ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 88 Fed. Appx. 391.

No. 03–10550. SHEARIN *v.* E. F. HUTTON GROUP, INC., ET AL. Sup. Ct. Del. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 840 A. 2d 642.

No. 03–10573. BALL *v.* RILEY, GOVERNOR OF ALABAMA, ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 03–10599. YOUNG *v.* QUARTERMAN, DIRECTOR, TEXAS JAIL DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 03–10958. MENDEZ *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 95 Fed. Appx. 463.

No. 03–10993. ROWELL *v.* CLARK COUNTY PUBLIC DEFENDER'S OFFICE ET AL. Sup. Ct. Nev. Motion of petitioner for leave

to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 120 Nev. 1279, 131 P. 3d 635.

No. 03–11045. AZUBUKO *v.* BERKSHIRE MUTUAL INSURANCE CO. ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–5104. SIEGEL *v.* CRESCENT RESOURCES, LLC, ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 04–5121. TERIO *v.* UNITED STATES. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 104 Fed. Appx. 174.

No. 04–5154. ORTLOFF *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule

38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 04–5308. KEENAN *v.* LECUREUX, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–5318. CARTER *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–5426. CLARK *v.* UNITED STATES DISTRICT COURTS FOR THE CENTRAL AND NORTHERN DISTRICTS OF CALIFORNIA. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 04A135. METZSCH *v.* AVAYA, INC. C. A. 8th Cir. Application to recall and stay the mandate, addressed to JUSTICE SCALIA and referred to the Court, denied. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

No. 03M84. CLARK *v.* CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY;

No. 03M86. MARTINEZ *v.* BREAUX ET AL.;

No. 03M88. VLASEK *v.* LEVEY;

No. 03M89. OYENIRAN *v.* UNITED STATES;

No. 03M90. WOOD *v.* CROWN REDI-MIX, INC., DBA CROWN BUILDING MATERIALS, INC.;

No. 04M1. GOODEN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION;

No. 04M3. HEIM *v.* UNIVERSITY OF MIAMI ET AL.;

No. 04M5. COURTER *v.* KANSAS ET AL.;

No. 04M6. CONTRERAS *v.* TEXAS;

No. 04M8. CALERO *v.* PAGAN PAGAN ET AL.;

No. 04M10. LEWIS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS; and

No. 04M11. MITCHELL *v.* PER-SE TECHNOLOGIES, INC. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 03M85. MARTINI *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL.;

No. 03M87. CHAVEZ *v.* UNITED STATES; and

No. 04M4. DOE *v.* UNITED STATES. Motions for leave to file petitions for writs of certiorari under seal with redacted copies for the public record granted.

No. 04M2. IN RE HUSSEIN. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 04M7. CHORCHES *v.* CHRYSLER FINANCIAL CO. LLC ET AL.; and

No. 04M9. GREENLEE *v.* UNITED STATES POSTAL SERVICE ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time under this Court's Rule 14.5 denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for fees and reimbursement of expenses granted, and the River Master is awarded a total of $2,516 for the period January 1 through March 31, 2004, and a total of $2,452.38 for the period April 1 through June 30, 2004. [For earlier order herein, see, *e. g.*, 540 U. S. 964.]

No. 02–626. SOUTH FLORIDA WATER MANAGEMENT DISTRICT *v.* MICCOSUKEE TRIBE OF INDIANS ET AL., 541 U. S. 95. Motion of respondent Friends of Everglades, Inc., for attorney's fees denied without prejudice to filing in the United States Court of Appeals for the Eleventh Circuit.

No. 03–898. ORTIZ VELEZ, MAYOR OF SABANA GRANDE, PUERTO RICO, ET AL. *v.* RIVERA-TORRES ET AL., 541 U. S. 972. Motion of respondents for attorney's fees denied without prejudice to filing in the United States Court of Appeals for the First Circuit.

No. 03–1445. REGIER, SECRETARY, FLORIDA DEPARTMENT OF CHILDREN & FAMILIES, ET AL. *v.* DOES 1–13 ET AL., 542 U. S. 920. Motion of respondents for attorney's fees denied without prejudice to filing in the United States Court of Appeals for the Eleventh Circuit.

No. 03–1237. MERCK KGAA *v.* INTEGRA LIFESCIENCES I, LTD., ET AL. C. A. Fed. Cir. The Acting Solicitor General is invited

to file a brief in this case expressing the views of the United States. JUSTICE O'CONNOR and JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 03–10777. KEUP *v.* WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES ET AL. Sup. Ct. Wis. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 03–1293. WHITFIELD *v.* UNITED STATES. C. A. 11th Cir.; and

No. 03–1294. HALL *v.* UNITED STATES. C. A. 11th Cir. Motions of petitioners for leave to proceed further herein *in forma pauperis* granted.

No. 03–9005. CUYLER *v.* WAL-MART STORES. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [541 U. S. 1061] denied. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 03–10284. IN RE BROOKS. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [541 U. S. 1084] denied.

No. 03–9046. RHINES *v.* WEBER, WARDEN. C. A. 8th Cir. [Certiorari granted, 542 U. S. 936.] Motion of petitioner for appointment of counsel granted. Roberto A. Lange, Esq., of Sioux Falls, S. D., is appointed to serve as counsel for petitioner in this case.

No. 03–9168. SHEPARD *v.* UNITED STATES. C. A. 1st Cir. [Certiorari granted, 542 U. S. 918.] Motion of petitioner for appointment of counsel granted. Linda J. Thompson, Esq., of Springfield, Mass., is appointed to serve as counsel for petitioner in this case.

No. 03–10574. IN RE SHEMONSKY;
No. 03–10769. IN RE SHEMONSKY;
No. 03–10857. IN RE SHEMONSKY;
No. 03–10891. ALLEN *v.* UNITED STATES. C. A. 2d Cir.;
No. 03–10900. NOBLE *v.* IOWA DEPARTMENT OF CORRECTIONS. C. A. 8th Cir.;
No. 03–10979. MERRITT *v.* UNITED STATES. C. A. 7th Cir.;
No. 04–5173. WRIGHT *v.* UNITED STATES. C. A. 3d Cir.; and

No. 04–5188. SHOBANDE *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 25, 2004, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 03–10259. IN RE RUSSELL. C. A. 6th Cir. Petition for writ of common-law certiorari denied.

No. 03–10762. IN RE AMIR-EL;
No. 03–10796. IN RE OGUNDE ET AL.;
No. 03–10844. IN RE KORNAFEL;
No. 03–10929. IN RE ACKLIN;
No. 04–297. IN RE CALIFORRNIAA;
No. 04–5233. IN RE THRASH;
No. 04–5306. IN RE PULLIAM;
No. 04–5340. IN RE MONTEZ;
No. 04–5404. IN RE ELLIS;
No. 04–5501. IN RE MARSH;
No. 04–5633. IN RE ZARATE;
No. 04–5701. IN RE CLUCK;
No. 04–5745. IN RE SCHEIDLY;
No. 04–5769. IN RE CROFT;
No. 04–5811. IN RE CRUZ-RIVERA;
No. 04–5834. IN RE DUMAS;
No. 04–5841. IN RE FOUCHE;
No. 04–5857. IN RE BEAUMONT;
No. 04–5902. IN RE OLSON;
No. 04–5918. IN RE DEMOUCHET;
No. 04–5933. IN RE LEVERETT;
No. 04–5946. IN RE HERRERA;
No. 04–6002. IN RE ABSALON;
No. 04–6093. IN RE BURGESS;
No. 04–6096. IN RE VERDONE;
No. 04–6130. IN RE HILL;
No. 04–6141. IN RE HARLEY; and
No. 04–6145. IN RE HUBBARD. Petitions for writs of habeas corpus denied.

No. 03–1645. IN RE GREEN;
No. 03–10052. IN RE JOHNSON;
No. 03–10356. IN RE MORGAN;

No. 03–10373. IN RE COLE;
No. 03–10509. IN RE RIVAS;
No. 03–10578. IN RE THOMAS;
No. 03–10708. IN RE GRICCO;
No. 03–10864. IN RE TAYLOR;
No. 03–10942. IN RE CROSBY;
No. 03–10992. IN RE SMITH;
No. 03–11027. IN RE VALLEY;
No. 04–5083. IN RE KOGER;
No. 04–5358. IN RE JOHNSON;
No. 04–5363. IN RE COLLINS;
No. 04–5372. IN RE PRI-HAR; and
No. 04–5411. IN RE HODGES. Petitions for writs of mandamus denied.

No. 03–1633. IN RE HEMPHILL. Petition for writ of mandamus denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 03–1596. IN RE ADAMS;
No. 03–10493. IN RE BROOKS;
No. 03–10905. IN RE CURTIS;
No. 04–5349. IN RE ARMSTRONG; and
No. 04–5822. IN RE YOUNG. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Denied. (See also No. 03–10259, *supra.*)

No. 03–1240. FLEXIBLE PRODUCTS CO. ET AL. *v.* ERVAST. C. A. 11th Cir. Certiorari denied. Reported below: 346 F. 3d 1007.

No. 03–1269. CASTELLANO *v.* FRAGOZO ET AL.; and
No. 03–1417. FRAGOZO ET AL. *v.* CASTELLANO. C. A. 5th Cir. Certiorari denied. Reported below: 352 F. 3d 939.

No. 03–1280. GEORGE E. WARREN CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 341 F. 3d 1348.

No. 03–1300. ZULICK *v.* WISE ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 575 Pa. 140, 834 A. 2d 1126.

No. 03–1304. WARD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 356 S. C. 449, 590 S. E. 2d 30.

No. 03–1375. RYBICKI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 354 F. 3d 124.

No. 03–1389. JUDICIAL WATCH, INC. *v.* INTERNAL REVENUE SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 335.

No. 03–1414. HAMILTON *v.* COLLETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 634.

No. 03–1418. HARRIS ET AL. *v.* FEDERAL AVIATION ADMINISTRATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 353 F. 3d 1006.

No. 03–1420. GRIFFIN ET AL. *v.* INDIANA DEPARTMENT OF LOCAL GOVERNMENT FINANCE. Tax. Ct. Ind. Certiorari denied. Reported below: 794 N. E. 2d 1171.

No. 03–1424. AL-MARRI *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 360 F. 3d 707.

No. 03–1425. BARMES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–1428. CITY OF AUSTIN, TEXAS, ET AL. *v.* BROWNLEE, ACTING SECRETARY OF THE ARMY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 352 F. 3d 235.

No. 03–1433. RANN *v.* CHAO, SECRETARY OF LABOR. C. A. D. C. Cir. Certiorari denied. Reported below: 346 F. 3d 192.

No. 03–1439. SOUSA, AS EXECUTOR OF THE WILL OF SOUSA, DECEASED, ET AL. *v.* UNILAB CORPORATION CLASS II (NON-EXEMPT) MEMBERS GROUP BENEFIT PLAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 954.

No. 03–1440. KALAMA SERVICES, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 354 F. 3d 1085.

No. 03–1448. TURNER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 267 Conn. 414, 838 A. 2d 947.

No. 03–1449. AEROQUIP-VICKERS, INC., AND SUBSIDIARIES, FKA TRINOVA CORP. AND SUBSIDIARIES *v.* COMMISSIONER OF IN-

TERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 347 F. 3d 173.

No. 03–1450. KHAN ET UX. *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied.

No. 03–1480. ISHLER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 385.

No. 03–1485. MCCLOY *v.* DEPARTMENT OF AGRICULTURE. C. A. 10th Cir. Certiorari denied. Reported below: 351 F. 3d 447.

No. 03–1487. FISHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 340 F. 3d 1261.

No. 03–1495. MORAN ET AL. *v.* HIBBS, DIRECTOR, ARIZONA DEPARTMENT OF REVENUE, ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 207 Ariz. 181, 84 P. 3d 446.

No. 03–1499. MARSH, EXECUTRIX OF THE ESTATE OF MARSH, ET AL. *v.* W. R. GRACE & CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 883.

No. 03–1504. MONIN *v.* MONIN, INC., ET AL. Ct. App. Ky. Certiorari denied.

No. 03–1506. WILLIAMS *v.* COLUMBUS METROPOLITAN HOUSING AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 870.

No. 03–1507. HARRELL *v.* CNA INSURANCE COS. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 579.

No. 03–1511. WRIGHT *v.* MONTGOMERY COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 312.

No. 03–1512. JOHNSON ET UX. *v.* CITY OF SHOREWOOD, MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 360 F. 3d 810.

No. 03–1515. CITY OF MCALESTER, OKLAHOMA, ET AL. *v.* PITTSBURGH COUNTY RURAL WATER DISTRICT NO. 7 ET AL.; and

No. 03–1643. PITTSBURGH COUNTY RURAL WATER DISTRICT NO. 7 *v.* CITY OF MCALESTER, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 358 F. 3d 694.

No. 03–1517. SCARROT ET AL. *v.* WILKINS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 350 F. 3d 949.

No. 03–1518. CHORTEK ET AL. *v.* CITY OF MILWAUKEE, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 356 F. 3d 740.

No. 03–1519. BRAMWELL *v.* FEDERAL BUREAU OF PRISONS. C. A. 9th Cir. Certiorari denied. Reported below: 348 F. 3d 804.

No. 03–1521. VISA U. S. A., INC. *v.* UNITED STATES; and
No. 03–1532. MASTERCARD INTERNATIONAL INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 344 F. 3d 229.

No. 03–1523. JAMES *v.* TUCK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 754.

No. 03–1524. HAEBERLE *v.* UNIVERSITY OF LOUISVILLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 895.

No. 03–1527. HENDERSON *v.* CAMPBELL, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 353 F. 3d 880.

No. 03–1529. SMITH *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 03–1533. KRSTIC *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 904.

No. 03–1534. RUIZ-VALERA *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 91 Fed. Appx. 168.

No. 03–1535. DESORDI *v.* BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 84 Fed. Appx. 160.

No. 03–1536. WATSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–1537. WALKER *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 03–1545. WOLK ET UX. *v.* ORANGE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 384.

No. 03–1546. ULYSSES I & CO., INC. *v.* FELDSTEIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 346 F. 3d 27.

No. 03–1548. NOVOTNY, IN HIS INDIVIDUAL CAPACITY AS TRUSTEE OF MIDWEST LIMITED AND SUNRISE INVESTMENTS *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 792.

No. 03–1549. GM ENTERPRISES, INC. *v.* TOWN OF ST. JOSEPH, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 350 F. 3d 631.

No. 03–1550. MONTANA RIGHT TO LIFE ASSN. ET AL. *v.* EDDLEMAN, IN HIS OFFICIAL CAPACITY AS COUNTY ATTORNEY FOR STILLWATER COUNTY, MONTANA, AND AS A REPRESENTATIVE OF THE CLASS OF COUNTY ATTORNEYS IN THE STATE OF MONTANA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 343 F. 3d 1085.

No. 03–1552. MAINSTREAM MARKETING SERVICES, INC., ET AL. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 358 F. 3d 1228.

No. 03–1554. PLEDGER, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN, PLEDGER ET AL., ET AL. *v.* PHIL GUILBEAU OFFSHORE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 690.

No. 03–1555. MOSS *v.* ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF AMSTERDAM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 81 Fed. Appx. 389.

No. 03–1557. SALEHPOOR *v.* SHAHINPOOR ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 358 F. 3d 782.

No. 03–1560. URENECK *v.* PING CUI. App. Ct. Mass. Certiorari denied. Reported below: 59 Mass. App. 809, 798 N. E. 2d 305.

No. 03–1561. GARCIA-ZAVALA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 03–1562. HCA INC. & SUBSIDIARIES, SUCCESSOR TO HOSPITAL CORPORATION OF AMERICA & SUBSIDIARIES *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 348 F. 3d 136.

No. 03–1563. HORTON ET AL. *v.* CITY OF HOUSTON, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 903.

No. 03–1564. GRANITE STATE OUTDOOR ADVERTISING, INC. *v.* CITY OF CLEARWATER, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 351 F. 3d 1112.

No. 03–1565. FAREY-JONES *v.* THEOFEL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 359 F. 3d 1066.

No. 03–1567. MYERS *v.* AMERICAN SOCIETY OF COMPOSERS, ACTORS, AND PUBLISHERS. C. A. 2d Cir. Certiorari denied.

No. 03–1568. MARTINEZ ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 81 Fed. Appx. 355.

No. 03–1569. MARTIN *v.* LOVE-LANE; and
No. 03–1680. LOVE-LANE *v.* MARTIN. C. A. 4th Cir. Certiorari denied. Reported below: 355 F. 3d 766.

No. 03–1572. JORGENSON *v.* CASON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 972.

No. 03–1574. WINCE ET AL. *v.* STEMLER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 350 F. 3d 578.

No. 03–1575. WASHINGTON-DULLES TRANSPORTATION, LTD. *v.* METROPOLITAN WASHINGTON AIRPORTS AUTHORITY. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 843.

No. 03–1576. MCCOMBS *v.* DESGUIN, IN HIS OFFICIAL CAPACITY AS PROPERTY APPRAISER, CHARLOTTE COUNTY, FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 870 So. 2d 822.

No. 03–1577. DECARLO, EXECUTRIX OF THE ESTATE OF DECARLO *v.* ARCHIE COMIC PUBLICATIONS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 88 Fed. Appx. 468.

No. 03–1578. SIRLEAF ET UX. *v.* BOOZER ET AL. C. A. 4th Cir. Certiorari denied.

No. 03–1582. ASSOCIATED BUILDERS & CONTRACTORS OF SOUTHERN CALIFORNIA, INC. *v.* ACOSTA, IN HER OFFICIAL CAPACITY AS ACTING CHIEF, DIVISION OF APPRENTICESHIP STANDARDS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 356 F. 3d 979.

No. 03–1584. HINES ET AL. *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 501.

No. 03–1587. ESTIVERNE *v.* HIBERNIA CORP. ET AL. Sup. Ct. La. Certiorari denied. Reported below: 868 So. 2d 22.

No. 03–1588. MINKA LIGHTING, INC. *v.* CRAFTMADE INTERNATIONAL, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 93 Fed. Appx. 214.

No. 03–1590. MEDINOL LTD. *v.* JOHNSON & JOHNSON ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 87 Fed. Appx. 729.

No. 03–1592. PREWITT ENTERPRISES, INC., ET AL. *v.* ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES. C. A. 11th Cir. Certiorari denied. Reported below: 353 F. 3d 916.

No. 03–1593. MONACO *v.* AMERICAN GENERAL ASSURANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 359 F. 3d 296.

No. 03–1594. ANGELICO *v.* LEHIGH VALLEY HOSPITAL, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 308.

No. 03–1595. EMPLOYERS INSURANCE OF WAUSAU *v.* EL BANCO DE SEGUROS DEL ESTADO. C. A. 7th Cir. Certiorari denied. Reported below: 357 F. 3d 666.

No. 03–1599. CITY OF MESA, ARIZONA *v.* PETERSEN. Sup. Ct. Ariz. Certiorari denied. Reported below: 207 Ariz. 35, 83 P. 3d 35.

No. 03–1600. GANTT *v.* SECURITY, USA, INC. C. A. 4th Cir. Certiorari denied. Reported below: 356 F. 3d 547.

No. 03–1602. ARTICHOKE JOE'S ET AL. *v.* NORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 353 F. 3d 712.

No. 03–1603. BLUE CIRCLE, INC. *v.* GEORGIA DEPARTMENT OF REVENUE ET AL. Ct. App. Ga. Certiorari denied.

No. 03–1604. BASKIN *v.* RUTHERFORD COUNTY, TENNESSEE, ET AL. Sup. Ct. Tenn. Certiorari denied.

No. 03–1605. ARRINGTON *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 593.

No. 03–1607. JOHNSON *v.* MCCULLAH ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–1608. NORD *v.* BLACK & DECKER DISABILITY PLAN. C. A. 9th Cir. Certiorari denied. Reported below: 356 F. 3d 1008.

No. 03–1609. PROVIDENCE HEALTH SYSTEM-WASHINGTON, DBA PROVIDENCE YAKIMA MEDICAL CENTER, DBA PROVIDENCE YAKIMA MEDICAL CENTER SKILLED NURSING FACILITY *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 353 F. 3d 661.

No. 03–1611. COMMONWEALTH CONSTRUCTION MANAGEMENT, INC., ET AL. *v.* BOARD OF ZONING APPEALS OF FAIRFAX COUNTY, VIRGINIA, ET AL. Sup. Ct. Va. Certiorari denied.

No. 03–1612. AGUSTIN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 92 Fed. Appx. 786.

No. 03–1613. LASHER *v.* LASHER. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–1614. MIN JIN *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 88 Fed. Appx. 456.

No. 03–1615. MCNEIL *v.* VERISIGN, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–1616. KAUR *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 843.

No. 03–1617. DOE *v.* THOMPSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–1618. CATHOLIC CHARITIES OF SACRAMENTO, INC. *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 32 Cal. 4th 527, 85 P. 3d 67.

No. 03–1620. HOBDY *v.* CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–1621. HOLTON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 126 S. W. 3d 845.

No. 03–1623. HAUGEN *v.* HENRY COUNTY, GEORGIA, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 277 Ga. 743, 594 S. E. 2d 324.

No. 03–1624. HELDT *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 03–1625. GARDNER *v.* HEARTLAND EXPRESS, INC. Sup. Ct. Iowa. Certiorari denied. Reported below: 675 N. W. 2d 259.

No. 03–1626. BARNA *v.* BARNA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 850 So. 2d 603.

No. 03–1627. HOWELL ET UX. *v.* RICCI ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 120 Nev. 1249, 131 P. 3d 609.

No. 03–1630. MANDYCZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 351 F. 3d 222.

No. 03–1631. BEAVERS *v.* BROWN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 529.

No. 03–1632. GANESAN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–1634. SUBSTANCE, INC., ET AL. *v.* CHICAGO BOARD OF EDUCATION. C. A. 7th Cir. Certiorari denied. Reported below: 354 F. 3d 624.

No. 03–1636. IN RE GROSS ET AL. Ct. App. Ky. Certiorari denied.

No. 03–1637. BARNETT *v.* COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 74.

No. 03–1638. CRAWFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 03–1639. BIODIVERSITY ASSOCIATES ET AL. *v.* CABLES, REGIONAL FORESTER, UNITED STATES FOREST SERVICE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 357 F. 3d 1152.

No. 03–1640. NEBRASKA ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 89 Fed. Appx. 277.

No. 03–1641. KING *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 799 N. E. 2d 42.

No. 03–1642. NEDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–1646. CANTU *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–1647. DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS *v.* TURNER ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 354 F. 3d 890.

No. 03–1649. MARTIN *v.* CITY OF OCEANSIDE, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 360 F. 3d 1078.

No. 03–1650. BIENER ET AL. *v.* CALIO, ELECTION COMMISSIONER OF DELAWARE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 361 F. 3d 206.

No. 03–1651. BOYADJIAN *v.* TRANS UNION CORP. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 868.

No. 03–1652. DOE ET AL. *v.* TANDESKE, COMMISSIONER, ALASKA DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 361 F. 3d 594.

No. 03–1653. HEDRICK *v.* WESTERN RESERVE CARE SYSTEM ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 355 F. 3d 444.

No. 03–1654. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 566.

No. 03–1656. DRELLES ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 90 Fed. Appx. 587.

No. 03–1657. BESTOR *v.* LIEBERMAN, UNITED STATES SENATOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 91 Fed. Appx. 156.

No. 03–1658. CUNNINGHAM *v.* HAMILTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 357.

No. 03–1659. BERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 312.

No. 03–1660. SCHMIER *v.* SUPREME COURT OF CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 03–1662. BECKWITH PLACE L. P. ET AL. *v.* GENERAL ELECTRIC CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 361 F. 3d 566.

No. 03–1663. GUAJARDO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied. Reported below: 363 F. 3d 392.

No. 03–1664. STERN *v.* ORLICK. Sup. Ct. Fla. Certiorari denied. Reported below: 869 So. 2d 540.

No. 03–1665. BANKHEAD ET AL. *v.* KNICKREHM, DIRECTOR, ARKANSAS DEPARTMENT OF HUMAN SERVICES, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 360 F. 3d 839.

No. 03–1666. SLAVIN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 1 N. Y. 3d 392, 807 N. E. 2d 259.

No. 03–1667. BONAVITACOLA ELECTRIC CONTRACTOR, INC., ET AL. *v.* BORO DEVELOPERS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 87 Fed. Appx. 227.

No. 03–1671. MCFALL *v.* WARD. Sup. Ct. Ga. Certiorari denied. Reported below: 277 Ga. 649, 593 S. E. 2d 340.

No. 03–1673. CYCENAS *v.* STONER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 954.

No. 03–1674. LURIE *v.* BLACKWELL, LIQUIDATING TRUSTEE OF THE POPKIN AND STERN LIQUIDATING TRUST. C. A. 8th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 543.

No. 03–1675. GRIGGS *v.* STATE BAR OF GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 277 Ga. 663, 593 S. E. 2d 328.

No. 03–1676. HAYES *v.* NICE SYSTEMS LTD. ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–1677. TILLEY ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 333.

No. 03–1678. ZIMMERMAN ET UX. *v.* CITY OF OAKLAND, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 451.

No. 03–1679. MORENO ET AL. *v.* SUMMIT MORTGAGE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 364 F. 3d 574.

No. 03–1682. GILMORE *v.* DEPARTMENT OF LABOR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 381.

No. 03–1683. STILLMAN *v.* COLORADO ET AL. Ct. App. Colo. Certiorari denied. Reported below: 87 P. 3d 200.

No. 03–1684. CRAIN BROTHERS INC. ET AL. *v.* LOVEJOY. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 862 So. 2d 490.

No. 03–1685. GUENTHER *v.* TIDEWATER INC. C. A. 5th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 625.

No. 03–1686. WILLY ET UX. *v.* VIRGINIA STATE CORPORATION COMMISSION. Sup. Ct. Va. Certiorari denied.

No. 03–1687. WILEY *v.* CITY OF CHICAGO, ILLINOIS, ET AL.; and

No. 03–1717. JONES *v.* WILEY. C. A. 7th Cir. Certiorari denied. Reported below: 361 F. 3d 994.

No. 03–1689. ROTHENBERG *v.* MINNESOTA BOARD OF CONTINUING LEGAL EDUCATION. Sup. Ct. Minn. Certiorari denied. Reported below: 676 N. W. 2d 283.

No. 03–1690. UNITED STATES EX REL. KARVELAS *v.* MELROSE-WAKEFIELD HOSPITAL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 360 F. 3d 220.

No. 03–1692. BARR *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 03–1695. VAUGHEN *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 870 So. 2d 824.

No. 03–1697. DOUDS ET AL. *v.* THOMPSON ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 852 So. 2d 299.

No. 03–1700. HINTON *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied.

No. 03–1701. CRAIG *v.* HOLSEY. Ct. App. Ga. Certiorari denied. Reported below: 264 Ga. App. 344, 590 S. E. 2d 742.

No. 03–1702. MANUEL *v.* SANDERSON FARMS, INC., PROCESSING DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 714.

No. 03–1703. ROCKEFELLER *v.* WESTINGHOUSE ELECTRIC CO., WASTE ISOLATION DIVISION, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 03–1704. ROACH *v.* SALDANO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 363 F. 3d 545.

No. 03–1705. TAYLOR *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA. C. A. 3d Cir. Certiorari denied. Reported below: 91 Fed. Appx. 746.

No. 03–1706. MARKOWITZ *v.* MARKOWITZ. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 118 S. W. 3d 82.

No. 03–1707. NORDYKE ET AL. *v.* KING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 319 F. 3d 1185.

No. 03–1708. MCANALLY *v.* CLARK COUNTY, NEVADA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 787.

No. 03–1709. UNION ELECTRIC CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 363 F. 3d 1292.

No. 03–1710. ESTY ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 88 Fed. Appx. 421.

No. 03–1711. SISLER *v.* SUPREME COURT OF MONTANA. Sup. Ct. Mont. Certiorari denied.

No. 03–1712. DEMIRZHIU ET UX. *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 263.

No. 03–1713. NU-LOOK DESIGN, INC. *v.* COMMISSIONER OF INTERNAL REVENUE; SUPERIOR PROSIDE, INC. *v.* COMMISSIONER OF INTERNAL REVENUE; and JOSEPH M. GREY PUBLIC ACCOUNTANT, P. C., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 356 F. 3d 290 (first judgment); 86 Fed. Appx. 510 (second judgment); 93 Fed. Appx. 473 (third judgment).

No. 03–1714. MICHAEL MINNIS & ASSOCIATES, P. C. *v.* KAW NATION. Ct. Civ. App. Okla. Certiorari denied. Reported below: 90 P. 3d 1009.

No. 03–1715. PHILIP MORRIS USA INC. *v.* LEWIS, DBA B&H VENDORS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 355 F. 3d 515.

No. 03–1716. LURIE CO. *v.* COOK COUNTY BOARD OF REVIEW. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 345 Ill. App. 3d 539, 803 N. E. 2d 55.

No. 03–1718. KNUTH *v.* KNUTH. Ct. App. Mich. Certiorari denied.

No. 03–1719. MULTI-TECH SYSTEMS, INC. *v.* MICROSOFT CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 357 F. 3d 1340.

No. 03–1720. UNDERWOOD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–1721. VINTILLA *v.* CITY OF ROCKY RIVER, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 274.

No. 03–8407. CROSS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 337 Ill. App. 3d 1153, 843 N. E. 2d 510.

No. 03–8535. FREEMAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 573 Pa. 532, 827 A. 2d 385.

No. 03–8805. COOPER, AKA SEALED DEFENDANT 1 *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 298.

No. 03–9116. BASKER *v.* BOYCE ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 857 So. 2d 195.

No. 03–9208. DESANTIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 518.

No. 03–9243. CASTILLO *v.* CORSINI, SUPERINTENDENT, BAY STATE CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 348 F. 3d 1.

No. 03–9284. MCCRAE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 574 Pa. 594, 832 A. 2d 1026.

No. 03–9334. ZHUO JIAN PING *v.* SUBDIVISION OFFICE OF IMMIGRATION AND NATURALIZATION SERVICES INS OFFICIALS. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 391.

No. 03–9465. REARDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 349 F. 3d 608.

No. 03–9664. BENSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 69 Fed. Appx. 197.

No. 03–9672. MARTINEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–9675. STRANGE *v.* NORFOLK SOUTHERN CORP. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 726.

No. 03–9719. CORBEIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 215.

No. 03–9746. SMITH *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 859.

No. 03–9755. MORRIS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 62.

No. 03–9777. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 384.

No. 03–9790. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 682.

No. 03–9803. WHITED *v.* DOTSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 888.

No. 03–9809. BRUNSHTEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 344 F. 3d 91.

No. 03–9823. GREEN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 333.

No. 03–9845. GUTIERREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 351 F. 3d 897.

No. 03–9866. THEODOROPOULOS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 358 F. 3d 162.

No. 03–9876. COLONNA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 360 F. 3d 1169.

No. 03–9891. CHAIREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 355 F. 3d 1099.

No. 03–9931. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 342 F. 3d 1245.

No. 03–10010. O'KANE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 86 Fed. Appx. 447.

No. 03–10035. NASSRALAH *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 88 Fed. Appx. 491.

No. 03–10038. RAYFORD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 125 S. W. 3d 521.

No. 03–10041. TROTTER *v.* HOOKS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10044. CUMMINGS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 261 Ga. App. 281, 582 S. E. 2d 231.

No. 03–10051. CHRISMON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 03–10055. ZIEGLER *v.* WATKINS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 684.

No. 03–10058. CORE *v.* CRIST, ATTORNEY GENERAL OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 03–10060. CHERRY *v.* BERGE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 513.

No. 03–10066. HAMILTON *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10079. HELTON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 713.

No. 03–10080. HERNANDEZ *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 197.

No. 03–10088. RUDOLL *v.* COLLERAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT WAYMART, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10089. CONTRERAS *v.* GARCIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 102.

No. 03–10091. HIRAHARA *v.* KRAMER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10095. HEIGHT *v.* MOORE, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10096. GUILLORY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–10097. IRUEGAS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10098. HAWTHORNE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–10099. SERRANO *v.* HAMLET, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 345 F. 3d 1071.

No. 03–10102. ANDERSON *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 257.

No. 03–10103. CORMIER *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 03–10106. ATAMIAN *v.* HAWK ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 842 A. 2d 1244.

No. 03–10108. KHAN *v.* MECHAM ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 50.

No. 03–10112. ORTEGA *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 03–10114. MORALES-PALACIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 369 F. 3d 442.

No. 03–10115. HILDEBRANT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10127. METHANY *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10128. GUTIERREZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10129. FORNEY *v.* FREEPORT TOWNSHIP ET AL. C. A. 10th Cir. Certiorari denied.

No. 03–10131. HOFFMAN *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10132. GARRETT *v.* FLEMING ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 238.

No. 03–10134. WARE *v.* WARE. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 862 So. 2d 90.

No. 03–10135. HOLSAPPLE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 266 Va. 593, 587 S. E. 2d 561.

No. 03–10138. SHACKELFORD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10139. RIDEAU *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 866 So. 2d 225.

No. 03–10146. JOHNSON *v.* VINER ET AL. C. A. 8th Cir. Certiorari denied.

No. 03–10147. JOHNSON ET AL. *v.* STRINGFELLOW ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 615.

No. 03–10148. MARTIN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–10150. WARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 909.

No. 03–10151. DYANDRIA M. *v.* ADMINISTRATION FOR CHILDREN'S SERVICES. Ct. App. N. Y. Certiorari denied. Reported below: 1 N. Y. 3d 623, 808 N. E. 2d 1280.

No. 03–10152. BYROM *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 863 So. 2d 836.

No. 03–10156. DAVIS *v.* BUDGE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 505.

No. 03–10161. MORALES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10164. RIVERA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 387.

No. 03–10165. BROWN *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 853 So. 2d 8.

No. 03–10169. TORRES *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10172. COLEMAN *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 984.

No. 03–10174. YOUNG *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10178. FRAZIER *v.* MITCHELL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 498.

No. 03–10179. ASHE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10180. ROCHA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–10183. ROBINSON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–10184. SENATOR *v.* VALADEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10189. GARDNER *v.* HERNANDEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10192. GREEN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 69 Fed. Appx. 197.

No. 03–10197. INGUAGGIATO *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–10200. CASHION, AS EXECUTRIX OF THE ESTATE OF SMITH, DECEASED *v.* TORBERT ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 885 So. 2d 745.

No. 03–10201. HELWIG *v.* KAPTURE. C. A. 6th Cir. Certiorari denied.

No. 03–10202. GLOVER *v.* TEXAS BOARD OF PARDONS AND PAROLES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 720.

No. 03–10204. GAITHER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10207. GOODMAN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10208. HARTSELL *v.* GALLAGHER BASSETT SERVICES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 670.

No. 03–10209. HOGAN *v.* MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 03–10211. REYES *v.* VERIZON DATA SERVICES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 656.

No. 03–10213. HAMPTON *v.* EPSTEIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 411.

No. 03–10214. GRIER *v.* MOORE, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10215. GREEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 336 Ill. App. 3d 1046, 841 N. E. 2d 542.

No. 03–10217. HARRIS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 03–10222. THORNTON *v.* HOOKS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10224. ROLAND *v.* HAMLET, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10228. CRAWFORD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 03–10234. WILSON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 841 A. 2d 309.

No. 03–10235. JOSEPH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–10238. ABREU ACEVES *v.* KNOWLES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–10240. PRIESTER *v.* LOWNDES COUNTY, MISSISSIPPI, SCHOOL DISTRICT, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 354 F. 3d 414.

No. 03–10243. SHANNON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 116 S. W. 3d 52.

No. 03–10245. ERICKSON *v.* WATERTOWN HEALTH DEPARTMENT ET AL. C. A. 1st Cir. Certiorari denied.

No. 03–10246. RISNER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 03–10249. WONSCHIK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 353 F. 3d 1192.

No. 03–10255. ARELLANO-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 119.

No. 03–10257. SABAN *v.* WASHINGTON GROUP INTERNATIONAL, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–10260. LEWIS *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10263. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 352 F. 3d 339.

No. 03–10268. TURNER *v.* LAMARQUE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 866.

No. 03–10270. VALDEZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 03–10279. SANDERS *v.* WAYNE COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 449.

No. 03–10281. AHUJA *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY (two judgments). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–10283. JOHNSON *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10285. REED *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–10286. MORALES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 03–10288. SHERRATT *v.* FRIEL, WARDEN. Ct. App. Utah. Certiorari denied.

No. 03–10289. O'BRIEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–10296. PROTOPAPPAS *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10298. LANDSBERGER *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10301. JOHNSON *v.* WARD, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 100.

No. 03–10302. JACKSON *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 853 So. 2d 712.

No. 03–10304. LORD *v.* MORGAN, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 347 F. 3d 1091.

No. 03–10305. CARNEY, AKA SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–10308. DAVIS *v.* WILSON, WARDEN, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 100 Ohio St. 3d 269, 798 N. E. 2d 379.

No. 03–10310. BLANDON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–10316. JONES *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Certiorari denied.

No. 03–10317. SAN JUAN NANCE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–10321. MOSLEY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10323. ROBERSON *v.* DALLAS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–10332. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 03–10333. JACKSON *v.* WALLER ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–10334. RICHARDS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 880 So. 2d 504.

No. 03–10335. BROWN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 264 Ga. App. 9, 589 S. E. 2d 830.

No. 03–10336. BABCOCK *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10339. BENDER *v.* RUNNELS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–10342. DAVIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 03–10343. CUELLAR *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10345. MORO *v.* RYAN ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 343 Ill. App. 3d 1310, 856 N. E. 2d 699.

No. 03–10349. MONSANTO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 348 F. 3d 345.

No. 03–10353. MIZUO *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10355. RUBY *v.* YARBOROUGH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 289.

No. 03–10357. BROWN *v.* GARCIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 256.

No. 03–10360. AUTREY *v.* PARSON. Ct. App. Miss. Certiorari denied. Reported below: 864 So. 2d 294.

No. 03–10363. WATERFIELD *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 388.

No. 03–10364. SCHEAFFER *v.* CARPENTERS LOCAL 377. C. A. 7th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 945.

No. 03–10371. YUCEL *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 918.

No. 03–10375. FIGUEROA *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari denied.

No. 03–10376. ISAAC *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10378. GAITHER *v.* BLANKS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10379. HAYES *v.* CHATMAN, WARDEN. Super. Ct. Hancock County, Ga. Certiorari denied.

No. 03–10381. GRAY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10382. HOOKER *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10383. HINTON *v.* GREEN ET AL. C. A. 6th Cir. Certiorari denied.

No. 03–10384. HADLEY *v.* JOCKISCH. C. A. 7th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 998.

No. 03–10385. HALSEY *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10387. HENDERSON *v.* OVERTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 115.

No. 03–10389. HERNDON *v.* LUOMA, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 780.

No. 03–10391. HENDERSON *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10393. CHEGWIDDEN *v.* KAPTURE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 309.

No. 03–10394. DUBOSE *v.* LADWIG ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 610.

No. 03–10402. LEWIS *v.* JOHNSON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 378.

No. 03–10404. DEVINCE TAVARES *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10405. WHITEFOOT *v.* BANCORPSOUTH BANK, FKA BANK OF MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 856 So. 2d 639.

No. 03–10406. TELLIS *v.* PALMATEER, SUPERINTENDENT, COFFEE CREEK CORRECTIONAL FACILITY. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 206.

No. 03–10409. MCCAULEY *v.* COOK'S PEST CONTROL, INC., ET AL. Ct. App. Ga. Certiorari denied.

No. 03–10410. PATTON *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–10411. MCCORD *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10412. DAVIS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 03–10418. PADILLA *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 03–10422. DI NARDO *v.* LEE'S MOVING & STORAGE, INC. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 03–10423. PORTER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10426. CAMPBELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 208 Ill. 2d 203, 802 N. E. 2d 1205.

No. 03–10431. SUDDUTH, AKA MUHAMMAD *v.* OHIO STATE UNIVERSITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 874.

No. 03–10433. OWEN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 03–10435. MURRAY *v.* VALADEZ, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10436. MCDANIEL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 03–10437. BROWNING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 869.

No. 03–10439. RODRIGUEZ *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–10440. STEFFLER *v.* COW CREEK BAND OF UMPQUA TRIBE OF INDIANS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 659.

No. 03–10441. RIVERA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10443. CLEMMONS *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 31 Kan. App. 2d xvi, 78 P. 3d 497.

No. 03–10445. CHAPMAN *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 82 Fed. Appx. 59.

No. 03–10447. SONNIER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10448. MAXWELL *v.* FOUNTAIN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 905.

No. 03–10450. MATHEWS *v.* SPALDING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 641.

No. 03–10452. ROUNDS *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 317.

No. 03–10454. DAVIS *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 932.

No. 03–10456. BAKER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10457. CARTER *v.* COLLINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 704.

No. 03–10458. GAVALDON *v.* CAMBRA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 628.

No. 03–10459. HANIBLE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 575 Pa. 255, 836 A. 2d 36.

No. 03–10461. FUENTES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 868.

No. 03–10464. CAMARGO FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 400.

No. 03–10465. FELLA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10466. GRAYS *v.* RAMIREZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 278.

No. 03–10468. WILLIAMS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 6.

No. 03–10470. MOORE *v.* HARGETT, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–10471. EDMONDS *v.* WASHINGTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 653.

No. 03–10472. KUNKLE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS

DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 352 F. 3d 980.

No. 03–10474. MURRAY *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–10476. WITHERS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–10479. CORDERO *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10480. COLEY *v.* CLARK, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 03–10484. RIZZO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 03–10485. MOSLEY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10486. BALAZINSKI *v.* MUNICIPALITY OF BRIDGEWATER TOWNSHIP, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 95 Fed. Appx. 462.

No. 03–10488. PERRY *v.* UNITED PARCEL SERVICE, INC. C. A. 6th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 860.

No. 03–10497. JOHNSON *v.* ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 351 F. 3d 988.

No. 03–10503. SHISINDAY *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–10504. WATTS *v.* ASHCROFT, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. Reported below: 84 Fed. Appx. 98.

No. 03–10505. WILSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 03–10511. HOOD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 665.

No. 03–10512. FURQUHARSEN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–10513. DEHGHANI *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10515. ESPINOZA *v.* CITY OF FORT WORTH, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 379.

No. 03–10517. FLEMING *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 343 Ill. App. 3d 1285, 856 N. E. 2d 688.

No. 03–10519. GOODSON *v.* BROWN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10521. MCNEAL *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. Sup. Ct. Mo. Certiorari denied.

No. 03–10523. NARAGON *v.* LEE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 910.

No. 03–10528. ROGERS *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 206.

No. 03–10533. BOYD *v.* HALL, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10534. JOHNSON *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10536. WHITWORTH *v.* PRICE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 458.

No. 03–10538. WATSON *v.* PLILER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–10540. JOHNSON *v.* DELLATIFA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 357 F. 3d 539.

No. 03–10542. PEREZ-REYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 922.

No. 03–10543. PRUITT *v.* HOOKS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 348 F. 3d 1355.

No. 03–10547. DAVENPORT *v.* RENO AIR, INC., ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 120 Nev. 1232, 131 P. 3d 594.

No. 03–10548. COLEMAN *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR. C. A. 11th Cir. Certiorari denied. Reported below: 345 F. 3d 861.

No. 03–10549. SEGRAVES *v.* MILLER, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–10551. SHIPMAN *v.* DOE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 433.

No. 03–10552. SIMMONS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 03–10553. SPURLOCK *v.* JOHNSON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 743.

No. 03–10554. MACKLIN *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 03–10555. JIMENEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–10556. JENNIS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–10557. MURRAY *v.* LYNCH, ATTORNEY GENERAL OF RHODE ISLAND, ET AL. C. A. 1st Cir. Certiorari denied.

No. 03–10558. MCNAY *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 634.

No. 03–10559. PIN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 03–10560. CHILDS *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 03–10561. KING *v.* THOMPSON, WARDEN. Super. Ct. Mitchell County, Ga. Certiorari denied.

No. 03–10562. MORGAN *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY; and MORGAN *v.* NORTHRIDGE HOSPITAL MEDICAL CENTER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–10564. RUSE *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–10565. REEVES *v.* HAYNES, CLERK, CIRCUIT COURT, 29TH JUDICIAL DISTRICT, TALLADEGA COUNTY, ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 03–10566. SINGLETON *v.* SANDERS. C. A. 5th Cir. Certiorari denied.

No. 03–10567. KELLER *v.* HANSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 949.

No. 03–10568. EPPERSON *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10569. JACKSON *v.* SIMMONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10570. LANIER *v.* FILION, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–10571. MACIEL *v.* FELKINS. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 317.

No. 03–10572. BAKER *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–10575. GARLAND *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 127 S. W. 3d 529.

No. 03–10579. AVERY *v.* CAMPBELL, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10580. SOARES *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–10582. CONWAY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–10583. CARAVELLA *v.* CITY OF NEW YORK, DEPARTMENT OF INVESTIGATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 79 Fed. Appx. 452.

No. 03–10584. WHEATLEY *v.* HINKLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 338.

No. 03–10585. BOWEN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 153 Md. App. 716.

No. 03–10588. OLIVEIRA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 03–10590. JOHNSON *v.* SHERRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10592. BRITTON *v.* LEHMAN, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 202.

No. 03–10596. MCNEIL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–10598. COTTON *v.* CASTRO, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 70 Fed. Appx. 964.

No. 03–10600. WILLIAMS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 833 A. 2d 1152.

No. 03–10607. COLLINS *v.* OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied.

No. 03–10611. JONES *v.* BASKERVILLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 32 Fed. Appx. 104.

No. 03–10612. BARBER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10614. TATE *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10615. DECOLOGERO *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied.

No. 03–10616. WALKER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 871 So. 2d 894.

No. 03–10617. CHRISTIAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 03–10621. SMITH *v.* MITCHELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 348 F. 3d 177.

No. 03–10622. BUSTAMANTE *v.* EVANS, WARDEN. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 344 Ill. App. 3d 1246, 859 N. E. 2d 330.

No. 03–10624. DOUGLAS *v.* WALTERS ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10626. RAY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–10627. BERRIAN *v.* SELSKY, DIRECTOR, SPECIAL HOUSING AND INMATE DISCIPLINARY PROGRAMS, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 100 N. Y. 2d 631, 801 N. E. 2d 415.

No. 03–10628. SAUNDERS *v.* TOURVILLE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 648.

No. 03–10630. STAFFNEY *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10632. BAILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 99.

No. 03–10633. REDMAN *v.* PITTS. Ct. App. D. C. Certiorari denied. Reported below: 852 A. 2d 962.

No. 03–10634. ADEGBUJI *v.* DEPARTMENT OF HOMELAND SECURITY. C. A. 3d Cir. Certiorari denied.

No. 03–10635. ADAMS *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 115 Cal. App. 4th 243, 9 Cal. Rptr. 3d 170.

No. 03–10637. GRAY *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 03–10638. CURRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 880.

No. 03–10639. PERALTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 108.

No. 03–10640. DUINA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–10641. ZEIGLER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 345 F. 3d 1300.

No. 03–10642. DUBOYS *v.* BOMBA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 62 Fed. Appx. 404.

No. 03–10643. LIVELY *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 90 Fed. Appx. 22.

No. 03–10644. MENDOZA, AKA VIZCARRA-ZAMORA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 632.

No. 03–10645. JACKSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 266 Va. 423, 587 S. E. 2d 532.

No. 03–10646. LAXEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 939.

No. 03–10647. BOWLING *v.* HAEBERLIN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 344 F. 3d 487.

No. 03–10649. WALKER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 863 So. 2d 1.

No. 03–10650. BEARDSLEE *v.* BROWN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 358 F. 3d 560.

No. 03–10651. WARD *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 89 Fed. Appx. 718.

No. 03–10652. WINDHAM *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10653. UPCHURCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 794.

No. 03–10654. PRIMUS *v.* OHIO DEPARTMENT OF JOB AND FAMILY SERVICES. Ct. App. Ohio, Portage County. Certiorari denied.

No. 03–10655. NEWMAN *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT. Sup. Ct. Cal. Certiorari denied.

No. 03–10658. MAY *v.* CALIFORNIA DEPARTMENT OF CHILD SUPPORT SERVICES ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–10659. MARTIN *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 03–10661. OLIVER *v.* COINER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 970.

No. 03–10662. DIXIE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–10663. ARCHER *v.* DORMIRE, SUPERINTENDENT, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied.

No. 03–10664. BARAJAS-CHAVEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 358 F. 3d 1263.

No. 03–10665. TAFARI, AKA WHITTINGTON *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–10666. MORENO TORRES *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10667. VEILLEUX *v.* CATTELL, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 03–10668. PEREZ *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 03–10670. BUELL *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 03–10671. MAXWELL *v.* CRIST, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10672. THIER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 869 So. 2d 541.

No. 03–10673. THOMPSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 359 F. 3d 470.

No. 03–10674. BEAR *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10675. ALLEN *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 03–10676. LEATHERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 354 F. 3d 955.

No. 03–10677. KINCY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 87.

No. 03–10678. BEATON-PAEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10679. MILLER *v.* SUPREME COURT OF MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 03–10680. ALLEN *v.* ALLEN. Family Ct. Cabell County, W. Va. Certiorari denied.

No. 03–10681. COLLINS *v.* BUDGE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 576.

No. 03–10682. WALKER *v.* POLK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 835.

No. 03–10683. IN SOO CHUN *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 227.

No. 03–10684. CANELA-NARANJO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10685. MATA-ESPINOZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 881.

No. 03–10686. GILDING *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 865 So. 2d 512.

No. 03–10687. BALES *v.* AULT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 701.

No. 03–10688. WARREN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 338 F. 3d 258.

No. 03–10689. BYNUM *v.* BENNING, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENSBURG, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10690. TISDALE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 357 S. C. 474, 594 S. E. 2d 166.

No. 03–10691. RODRIGUEZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10692. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10693. ARAGON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 879.

No. 03–10694. SLANINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 359 F. 3d 356.

No. 03–10696. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10698. CHAMBERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 03–10699. BUTLER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 870 So. 2d 820.

No. 03–10701. BLYE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 130 S. W. 3d 776.

No. 03–10702. HALE *v.* DEPARTMENT OF DEFENSE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 56.

No. 03–10703. GAETA-DUARTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 327.

No. 03–10704. GARCIA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 323.

No. 03–10706. GUTIERREZ-BARAJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 222.

No. 03–10707. HAGER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 791 A. 2d 911.

No. 03–10709. GOODMAN *v.* ALBANY AREA COMMUNITY SERVICE BOARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 388.

No. 03–10710. RINALDI *v.* TRANCOSO, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–10711. PAYNE *v.* VANGUARD CELLULAR SYSTEMS, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 656.

No. 03–10712. PUGA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–10713. REEVES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10714. SUTTON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10715. RODRIGUEZ *v.* GROMETER, JUSTICE, APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 03–10716. SMITH *v.* OLSON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 181.

No. 03–10717. SYKOSKY *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 871 So. 2d 215.

No. 03–10718. ROSS *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 900.

No. 03–10719. MARTINEZ-CORTEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 354 F. 3d 830.

No. 03–10720. LYTLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 453.

No. 03–10722. LEWIS *v.* DISTRICT OF COLUMBIA LOTTERY AND CHARITABLE GAMES BOARD. Ct. App. D. C. Certiorari denied. Reported below: 821 A. 2d 361.

No. 03–10723. HONG MAI *v.* NEW YORK STATE DEPARTMENT OF WELFARE ET AL. C. A. 2d Cir. Certiorari denied.

No. 03–10724. MCBEE *v.* DAVENPORT ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10725. MURPHY *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 89 Fed. Appx. 702.

No. 03–10728. TUPPER *v.* TUPPER. Ct. App. Ariz. Certiorari denied.

No. 03–10729. THOMAS *v.* ROCHE, SECRETARY OF THE AIR FORCE. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 923.

No. 03–10731. PELHAM *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–10732. THOMAS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10733. BODDIE *v.* GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 307 App. Div. 2d 555, 762 N. Y. S. 2d 295.

No. 03–10734. MARQUEZ-MUNOZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 626.

No. 03–10735. COLDREN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 359 F. 3d 1253.

No. 03–10736. CAZARES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 130.

No. 03–10737. TITTI SAMBA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 858.

No. 03–10738. SANTO *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10739. VITEK *v.* SPIEZIO. C. A. 6th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 28.

No. 03–10740. BASKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 631.

No. 03–10741. DOMINGUEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 359 F. 3d 839.

No. 03–10743. RILEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 78 Fed. Appx. 171.

No. 03–10744. ROMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 91 Fed. Appx. 767.

No. 03–10746. PEREZ *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 926.

No. 03–10747. PASTRANA LOPEZ, AKA LOPEZ PASTRANA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 120 Nev. 1261, 131 P. 3d 619.

No. 03–10748. MATA-RAMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 610.

No. 03–10749. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 383.

No. 03–10750. KLEIN *v.* WHITE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10751. JOSEPH *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10753. AREY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 153 Md. App. 716.

No. 03–10754. CARRIZOZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 467.

No. 03–10756. MCKINNEY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 817 A. 2d 1181.

No. 03–10758. PINET *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 841 A. 2d 577.

No. 03–10759. TWEH *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 03–10761. AANESTAD *v.* SAN FRANCISCO COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 162.

No. 03–10763. BRISCOE, AKA DOE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 03–10764. ARAUJO, AKA HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 276.

No. 03–10765. BREWBAKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 419.

No. 03–10766. ELIZALDE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 362 F. 3d 323.

No. 03–10768. SINGLETON *v.* GUNN. C. A. 5th Cir. Certiorari denied.

No. 03–10770. RINGO *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 03–10771. RAMIREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 83 Fed. Appx. 384.

No. 03–10772. REYNOLDS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–10773. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–10774. ARMSTRONG *v.* GREENE, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–10775. PEARSON *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 798 N. E. 2d 269.

No. 03–10778. MATA *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10779. XIANGWEN WU *v.* SALT LAKE COUNTY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 53.

No. 03–10780. JAMES *v.* CHESNEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10781. BOSTIC *v.* DWYER, SUPERINTENDENT, SOUTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–10782. BROWN *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–10783. SENECA, AKA STRICKLAND *v.* HALLAHAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 187.

No. 03–10784. ANDERSON *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10785. JACKSON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 03–10786. MARTINI *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 179 N. J. 306, 845 A. 2d 132.

No. 03–10787. CLARK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–10788. WHITEMAN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 846 A. 2d 239.

No. 03–10789. BROOKS *v.* WESTON, DISTRICT ATTORNEY FOR BIBB COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10790. PARRA *v.* CIGNA GROUP INSURANCE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 932.

No. 03–10791. ARANSEVIA *v.* MCKELVY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 655.

No. 03–10792. JEFFERSON, AKA MATHEW *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–10793. STEELE *v.* COTTEY, SHERIFF, MARION COUNTY, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied.

No. 03–10794. STEPHENSON *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10795. SPILLANE *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied.

No. 03–10797. CARNIVALE *v.* NEW YORK STATE DEPARTMENT OF EDUCATION. C. A. 2d Cir. Certiorari denied.

No. 03–10798. CARPENTER *v.* UNITED STATES; and
No. 03–10848. CARPENTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 360 F. 3d 591.

No. 03–10799. DRAYTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10800. CAGE-BARILE *v.* BARILE. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–10801. CROWLEY *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 36.

No. 03–10803. DURHAM *v.* WASHBURN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 90 Fed. Appx. 434.

No. 03–10804. DEMETER *v.* PENNSYLVANIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 870.

No. 03–10805. EDWARDS *v.* YARBOROUGH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–10806. CURRIE *v.* BLANKS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10809. COOKSON *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 837 A. 2d 101.

No. 03–10811. TOLBERT *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 379 Md. 424, 842 A. 2d 63.

No. 03–10812. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 356 F. 3d 1268.

No. 03–10814. HAYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 390.

No. 03–10815. HAMPTON *v.* RAMIREZ-PALMER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10816. DICKENS *v.* FILION, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–10818. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 803.

No. 03–10820. HUDAIR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–10821. AMAKER *v.* COOMBE ET AL. C. A. 2d Cir. Certiorari denied.

No. 03–10822. JOHNLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 993.

No. 03–10823. PATAYAN SORIANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 361 F. 3d 494.

No. 03–10825. AMURE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 52.

No. 03–10826. MAYERS *v.* WHITE, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 467.

No. 03–10827. JOHNSON *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10828. BATES *v.* QUINLAN ET AL. C. A. 7th Cir. Certiorari denied.

No. 03–10829. WILLIAMS *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10830. ORTIZ-DUARTES, AKA RAMOS-LIRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 608.

No. 03–10831. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 462.

No. 03–10832. BLUE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 125 S. W. 3d 491.

No. 03–10833. BURNS *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–10834. RATIGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 351 F. 3d 957.

No. 03–10837. STRINGER *v.* ALBEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 449.

No. 03–10838. ROACH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 1 App. Div. 3d 963, 767 N. Y. S. 2d 326.

No. 03–10839. MUNOZ-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 107.

No. 03–10840. POWELL *v.* ROWLEY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–10841. TIEN MINH NGUYEN *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10842. BECHTEL *v.* HULL, GOVERNOR OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–10843. MARTIN *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–10845. MAHMOUD *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 359.

No. 03–10846. CEBREROS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 917.

No. 03–10847. CORDERO-LUCIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 113.

No. 03–10849. ESTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 364.

No. 03–10850. CUNNINGHAM *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 344 Ill. App. 3d 1232, 859 N. E. 2d 324.

No. 03–10852. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 03–10853. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 97 Fed. Appx. 348.

No. 03–10854. BONNER *v.* ST. MARTIN PARISH SCHOOL BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 612.

No. 03–10855. BURRELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10856. MCIVER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 82 Fed. Appx. 697.

No. 03–10859. ALCORN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 37.

No. 03–10860. ROLLER *v.* WILLIAMS, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 03–10861. SINGLETARY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 623.

No. 03–10862. YORK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 937.

No. 03–10863. TOCCALINE *v.* LANTZ, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. App. Ct. Conn. Certiorari denied. Reported below: 80 Conn. App. 792, 837 A. 2d 849.

No. 03–10865. NIEVES DIAZ *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 869 So. 2d 538.

No. 03–10866. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–10867. VERDELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 57.

No. 03–10868. SMITHERMAN *v.* MOSLEY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 03–10869. RENTERIA *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10870. LYNN *v.* ALLEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 469.

No. 03–10871. ANDERSON *v.* DEMIS. C. A. 6th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 367.

No. 03–10872. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–10873. GARCIA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–10874. HOPKINSON *v.* LABOVITZ ET AL. Sup. Ct. Ga. Certiorari denied.

No. 03–10875. MENDOZA *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. D. C. Cir. Certiorari denied. Reported below: 92 Fed. Appx. 3.

No. 03–10876. MINEFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10878. LOPEZ-PAYAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 234.

No. 03–10880. PRINGLE *v.* BEZY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 490.

No. 03–10881. SIMS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10882. PEREA *v.* BUSH, PRESIDENT OF THE UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–10883. NORIEGA-ZAMORA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 921.

No. 03–10885. MCDONALD *v.* ARMSTRONG, SUPERINTENDENT, WILDWOOD CORRECTIONAL COMPLEX. C. A. 9th Cir. Certiorari denied.

No. 03–10886. LANG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 787.

No. 03–10887. LINDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 164.

No. 03–10889. BIGGS *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 442.

No. 03–10890. RAHEMAN-FAZAL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 355 F. 3d 40.

No. 03–10892. SMITH *v.* MCADORY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–10893. JONES *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 96 Fed. Appx. 742.

No. 03–10894. DAVIS *v.* ROBINSON, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 03–10895. FITZPATRICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–10896. GILLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 358 F. 3d 386.

No. 03–10898. FREEMAN *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 76 Fed. Appx. 949.

No. 03–10899. FOREST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 355 F. 3d 942.

No. 03–10901. THIVEL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 343 Ill. App. 3d 1295, 856 N. E. 2d 693.

No. 03–10902. WATSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10903. UFOMADUH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 92 Fed. Appx. 834.

No. 03–10904. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 874.

No. 03–10906. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 385.

No. 03–10907. CARPENTER *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10909. HARVEY *v.* STALDER, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. Sup. Ct. La. Certiorari denied. Reported below: 869 So. 2d 886.

No. 03–10910. HUNT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 702.

No. 03–10912. GUILLORY *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10913. FREEMAN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 03–10914. HINES *v.* MCLEOD, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 86.

No. 03–10915. LUGO VELEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 352 F. 3d 499.

No. 03–10916. HERRINGTON *v.* HUMPHREY, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 03–10917. HAMILTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 308 App. Div. 2d 416, 764 N. Y. S. 2d 820.

No. 03–10918. GIVENS *v.* FINN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10919. FASOLA *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 66 Fed. Appx. 524.

No. 03–10920. HARO *v.* RAMIREZ-PALMER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10921. IACULLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10922. FITTS *v.* BIRKETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10923. GRESHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 384.

No. 03–10924. HOLT *v.* GORDON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10925. LOPEZ HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 739.

No. 03–10926. MATZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 879.

No. 03–10927. STEVENS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 867 So. 2d 219.

No. 03–10928. LAUREANO *v.* PATAKI, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 03–10930. AUSTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 139.

No. 03–10931. ALLEN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10932. GARCIA-TIRADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 277.

No. 03–10933. SNYDER *v.* ADDISON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 675.

No. 03–10934. HERNANDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 697.

No. 03–10935. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 361 F. 3d 918.

No. 03–10936. TYLER *v.* MITCHELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10937. CURRY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 835 A. 2d 1098.

No. 03–10939. ROMER *v.* CALIFORNIA ET AL. (two judgments). C. A. 9th Cir. Certiorari denied.

No. 03–10940. HEADLEY *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 92 Fed. Appx. 35.

No. 03–10941. NGOC-HAHN THI DANG-NGUYEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 608.

No. 03–10943. MENDOZA *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 03–10944. PANDALES-ANGULO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 665.

No. 03–10946. CAMPOS-FUERTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 F. 3d 956 and 366 F. 3d 691.

No. 03–10947. SALAZAR-SAMANIEGA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 361 F. 3d 1271.

No. 03–10948. PENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 902.

No. 03–10949. SANCHEZ *v.* BUSH, PRESIDENT OF THE UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–10950. RATLIFF *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–10951. MARTIN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 03–10952. PATRICK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 409.

No. 03–10953. LENOIR *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 868 So. 2d 345.

No. 03–10954. KRONCKE *v.* TRUILLO, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–10955. PRESINAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 91 Fed. Appx. 732.

No. 03–10956. ECKARDT *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–10957. TURAY *v.* SELING. C. A. 9th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 606.

No. 03–10959. HOWE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 464.

No. 03–10960. GWINN *v.* AWMILLER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 354 F. 3d 1211.

No. 03–10962. JOHNSON *v.* TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 03–10963. HIGH *v.* MCGRATH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–10965. HEAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 42 Fed. Appx. 633.

No. 03–10966. BEJARANO GUILLEN, AKA BEJARAAO GUILLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–10967. HOOKER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10968. HIGHERS *v.* KAPTURE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 48.

No. 03–10969. FARRIS *v.* SHUPING ET AL. Ct. App. Ga. Certiorari denied.

No. 03–10970. GRANDISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 320.

No. 03–10971. HOUGH *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 03–10972. GIBSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10973. FLOWERS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 674.

No. 03–10974. GEORGEOFF *v.* TAMBI, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10975. GRANDISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 287.

No. 03–10976. HALL *v.* SCOTT, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–10977. GUTIERREZ *v.* BLANKS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10978. GRISSETTE *v.* RAMSEY, SHERIFF, KANE COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 67.

No. 03–10980. MUEHLBERG *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 03–10981. JONES *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 85 Fed. Appx. 763.

No. 03–10982. LAMMERS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 267 Neb. 679, 676 N. W. 2d 716.

No. 03–10984. MATTHEWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 55.

No. 03–10985. LEJEUNE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 277 Ga. 749, 594 S. E. 2d 637.

No. 03–10986. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–10987. OVALLE-MARQUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 91 Fed. Appx. 162.

No. 03–10988. DELA CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 358 F. 3d 623.

No. 03–10989. EALY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 363 F. 3d 292.

No. 03–10990. FINUCAN *v.* MARYLAND BOARD OF PHYSICIAN QUALITY ASSURANCE. Ct. App. Md. Certiorari denied. Reported below: 380 Md. 577, 846 A. 2d 377.

No. 03–10991. GARCIA-GALAVIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 611.

No. 03–10994. HOLLAND *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 03–10995. HOWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 354 F. 3d 693.

No. 03–10996. HARRELL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 879.

No. 03–10997. HENRY *v.* CHATMAN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 385.

No. 03–10998. COVINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 89.

No. 03–10999. EDWARDS *v.* NEPONSIT HEALTH CARE CENTER ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 1 App. Div. 3d 669, 766 N. Y. S. 2d 616.

No. 03–11000. CAISON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 781.

No. 03–11001. CALDWELL *v.* MILLER, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY AND ANNEX. C. A. 2d Cir. Certiorari denied.

No. 03–11002. CHAPLIN, AKA CHAPLAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 184.

No. 03–11003. NELSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 647.

No. 03–11004. MCCLURKIN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 341 Ill. App. 3d 1110, 853 N. E. 2d 450.

No. 03–11005. KASSEBAUM *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 89 Fed. Appx. 310.

No. 03–11006. KIRKHAM, AKA RO *v.* UNITED STATES; and
No. 03–11048. ANDERSON, AKA NELSON, AKA WEST, AKA JONES, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 487.

No. 03–11007. ARORA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 646.

No. 03–11008. BURCH *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–11009. SANDERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 749.

No. 03–11010. SEGURA *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 377.

No. 03–11011. STRICKLAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–11012. REDFORD *v.* REDFORD. Super. Ct. Gwinnett County, Ga. Certiorari denied.

No. 03–11013. ROMER *v.* YUBA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 613.

No. 03–11014. ZIEGLER, AKA LILLY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 886 So. 2d 127.

No. 03–11015. BURSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 590.

No. 03–11016. WRIGHT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 195.

No. 03–11017. WHITAKER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–11018. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 209 Ill. 2d 227, 807 N. E. 2d 448.

No. 03–11019. WHITLEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 03–11020. GERMAN ZETINO *v.* HERNANDEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–11021. WARNER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–11022. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–11023. RA *v.* SABBAGH. Super. Ct. N. J., App. Div. Certiorari denied.

No. 03–11024. MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 782.

No. 03–11025. TRACEY *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 341 F. 3d 1037.

No. 03–11026. ABDENBI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 361 F. 3d 1282.

No. 03–11028. WOODBERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 589.

No. 03–11029. DAVIDSON *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 963.

No. 03–11030. SILVERIO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–11031. WORLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 44.

No. 03–11032. TRIPLETT *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–11034. CUERVO, AKA BADESSA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 354 F. 3d 969.

No. 03–11035. FREEMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 03–11036. BREEDLOVE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 868 So. 2d 522.

No. 03–11037. ALLEN *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 366 F. 3d 396.

No. 03–11039. MCVEAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 847.

No. 03–11041. BOND *v.* BOND. C. A. 2d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 23.

No. 03–11043. TAYLOR *v.* DEROSA, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 970.

No. 03–11044. AKBAR *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 605.

No. 03–11047. EDISON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–11050. JONES *v.* FLORENCE COUNTY TAX ASSESSOR OFFICE. C. A. 4th Cir. Certiorari denied.

No. 03–11051. WOODWARD *v.* ROMERO, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–11052. MCCLELLAN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–11053. ISOM *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 356 Ark. 156, 148 S. W. 3d 257.

No. 03–11054. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–11055. PAGE *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. Sup. Ct. Ore. Certiorari denied. Reported below: 336 Ore. 379, 84 P. 3d 133.

No. 03–11056. CRAWFORD *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 867 So. 2d 196.

No. 03–11057. MINES *v.* DiGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 96 Fed. Appx. 802.

No. 03–11058. MALONEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 252.

No. 03–11059. ESCOBAR *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–11060. ASHBY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 03–11061. KAILING *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 859 So. 2d 1206.

No. 03–11062. HUDLER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 674.

No. 03–11064. ESCARCEGA-DURAN *v.* UNITED STATES; and SALABART-GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 993 (second judgment); 96 Fed. Appx. 458 (first judgment).

No. 03–11065. REYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 358 F. 3d 1095.

No. 03–11066. RAINEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 877.

No. 03–11068. JEAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 680.

No. 03–11069. DAVIS *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 03–11070. WALDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 363 F. 3d 1103.

No. 03–11071. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 03–11072. MAHORNEY *v.* JORDAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–11073. PERKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 968.

No. 03–11074. BISHOP *v.* CITY OF HENDERSON, NEVADA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 232.

No. 03–11075. SANDOVAL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–11076. ROUSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 362 F. 3d 256.

No. 03–11077. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 360 F. 3d 949.

No. 03–11078. RIVERA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–11079. ADKINS *v.* HOLLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 886.

No. 03–11080. MONTANIO *v.* FARWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–11081. OSTRANDER *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 441 Mass. 344, 805 N. E. 2d 497.

No. 03–11082. AVILES *v.* HUANG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 239.

No. 03–11083. ANGEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 355 F. 3d 462.

No. 03–11084. OTTO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 801.

No. 03–11085. TRINIDAD-RENOVATO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 350.

No. 03–11086. TOOMER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 713.

No. 03–11087. ANDRES-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 529.

No. 03–11088. PORTILLO-CANDIDO *v.* UNITED STATES (Reported below: 95 Fed. Appx. 117); MUNOZ-PATLAN *v.* UNITED STATES (95 Fed. Appx. 606); ROMERO RODRIGUEZ, AKA GARCIA *v.* UNITED STATES (93 Fed. Appx. 663); VILLAFUERTE-RODRIGUE *v.* UNITED STATES (95 Fed. Appx. 118); MONTEIRO-DE OLIVEIRA *v.* UNITED STATES (95 Fed. Appx. 582); VASQUEZ-HERNANDEZ *v.* UNITED STATES (95 Fed. Appx. 629); PEREZ-OCANAS *v.* UNITED STATES (95 Fed. Appx. 661); RUIZ-RUIZ *v.* UNITED STATES (95 Fed. Appx. 662); VILLALOBOS-CARDENAS *v.* UNITED STATES (95 Fed. Appx. 630); SOLIS-RAMIREZ *v.* UNITED STATES (95 Fed. Appx. 645); BALDERAS-ROMAN *v.* UNITED STATES (92 Fed. Appx. 990); OROZCO-VENCES, AKA OROZCO-BENCES *v.* UNITED STATES (95 Fed. Appx. 631); MENDOZA-AGUILAR, AKA AGUILAR-GUZMAN *v.* UNITED STATES (95 Fed. Appx. 663); VARELA, AKA REYERS *v.* UNITED STATES (95 Fed. Appx. 648); ORDONEZ-VASQUEZ, AKA ALVAREZ *v.* UNITED STATES (95 Fed. Appx. 578); RAMIREZ-HAREO, AKA ILARIO RAMIREZ *v.* UNITED STATES (95 Fed. Appx. 632); ORLANDO REYES *v.* UNITED STATES (95 Fed. Appx. 651); MARTINEZ-ALVARADO, AKA MARTINEZ-MARTINEZ *v.* UNITED STATES (96 Fed. Appx. 187); and NAVARRO-LOPEZ, AKA LOPEZ-CORTEZ *v.* UNITED STATES (95 Fed. Appx. 587). C. A. 5th Cir. Certiorari denied.

No. 03–11089. BRUGMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 F. 3d 613.

No. 03–11090. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–11091. ABDUL-KHABIR *v.* DAVIS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 877.

No. 04–2. AISENBERG ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 358 F. 3d 1327.

No. 04–3. BOROWIEC ET AL. *v.* GATEWAY 2000, INC. Sup. Ct. Ill. Certiorari denied. Reported below: 209 Ill. 2d 376, 808 N. E. 2d 957.

No. 04–4. CIT LEASING CORP. *v.* DENTON CENTRAL APPRAISAL DISTRICT ET AL. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 115 S. W. 3d 261.

No. 04–5. DOE RUN RESOURCES CORP. ET AL. *v.* NEILL, JUDGE, TWENTY-SECOND JUDICIAL CIRCUIT, ST. LOUIS, MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 128 S. W. 3d 502.

No. 04–7. MILITELLO *v.* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 360 F. 3d 681.

No. 04–8. NEVILLE CHEMICAL CO. *v.* CALIFORNIA, ON BEHALF OF THE CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL. C. A. 9th Cir. Certiorari denied. Reported below: 358 F. 3d 661.

No. 04–9. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 887.

No. 04–10. WILSON *v.* ILLINOIS DEPARTMENT OF PROFESSIONAL REGULATION ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 344 Ill. App. 3d 897, 801 N. E. 2d 36.

No. 04–11. PACIFIC PROPERTIES & DEVELOPMENT CORP. *v.* DISABLED RIGHTS ACTION COMMITTEE. C. A. 9th Cir. Certiorari denied. Reported below: 358 F. 3d 1097.

No. 04–13. HAGEN *v.* JIM CLARK MOTORS, INC. Ct. App. Kan. Certiorari denied.

No. 04–16. ADAMS *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 70 Fed. Appx. 795.

No. 04–17. TY, INC., ET AL. *v.* PEACEABLE PLANET, INC. C. A. 7th Cir. Certiorari denied. Reported below: 362 F. 3d 986.

No. 04–19. BRANDYWINE, INC., DBA EXPRESSWAY VIDEO, ET AL. *v.* CITY OF RICHMOND, KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 359 F. 3d 830.

No. 04–20. ABELA ET UX. *v.* GENERAL MOTORS CORP. Sup. Ct. Mich. Certiorari denied. Reported below: 469 Mich. 603, 677 N. W. 2d 325.

No. 04–21. PATRY *v.* TOWN OF GRAND ISLE, VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 176 Vt. 627, 852 A. 2d 573.

No. 04–22. PLANT FAB INC. ET AL. *v.* CROMPTON MANUFACTURING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 335.

No. 04–25. DICKERSON *v.* KANSAS ET AL. Ct. App. Kan. Certiorari denied. Reported below: 32 Kan. App. 2d xx, 80 P. 3d 1201.

No. 04–26. CHADWICK *v.* CAULFIELD, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 04–27. AMERICAN NATIONAL INSURANCE CO. ET AL. *v.* BRATCHER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 365 F. 3d 408.

No. 04–29. KAY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 362.

No. 04–30. JARMUTH ET AL. *v.* KROLCZYK ET AL. Cir. Ct. Monongalia County, W. Va. Certiorari denied.

No. 04–34. ELWOOD *v.* MORIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 964 and 87 Fed. Appx. 617.

No. 04–35. CASEY *v.* ALBERTSON'S, INC. C. A. 9th Cir. Certiorari denied. Reported below: 362 F. 3d 1254.

No. 04–36. COB CLEARINGHOUSE CORP., AKA DIGITAL HEALTHCARE, INC. *v.* AETNA U. S. HEALTHCARE, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 362 F. 3d 877.

No. 04–41. ROCKEFELLER *v.* REHNQUIST, CHIEF JUSTICE OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 04–42. HAYES *v.* SMALL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–45. NAVAJO NATION *v.* KRYSTAL ENERGY CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 357 F. 3d 1055.

No. 04–48. BARIBEAU ET AL. *v.* GUSTAFSON. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 107 S. W. 3d 52.

No. 04–49. TIG INSURANCE CO. *v.* SECURITY INSURANCE COMPANY OF HARTFORD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 360 F. 3d 322.

No. 04–50. ALLEN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 96 Fed. Appx. 688.

No. 04–53. BUTRY *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–54. APPLING ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 340 F. 3d 769.

No. 04–55. MICHIGAN ET AL. *v.* YELLOW TRANSPORTATION, INC. Ct. App. Mich. Certiorari denied. Reported below: 257 Mich. App. 602, 669 N. W. 2d 553.

No. 04–56. BISACCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–57. MICHIGAN ET AL. *v.* SCHNEIDER NATIONAL CARRIERS, INC., ET AL. Ct. App. Mich. Certiorari denied.

No. 04–58. OLIVARES ET UX. *v.* BIRDIE L. NIX TRUST. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 126 S. W. 3d 242.

No. 04–61. LIPKO *v.* CHRISTIE. C. A. 2d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 12.

No. 04–62. STANTINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–63. CORNEAL ET UX. *v.* JACKSON TOWNSHIP, HUNTINGDON COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 76.

No. 04–64. COVUCCI *v.* SERVICE MERCHANDISE CO., INC. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1294.

No. 04–67. BRIDWELL ET AL. *v.* TEXAS WORKERS' COMPENSATION INSURANCE FUND. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 04–68. FRANCOLINO *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 365 F. 3d 137.

No. 04–71. COMMUNITY MENTAL HEALTH CENTER OF ALEXANDRIA ET AL. *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 777.

No. 04–72. ELWOOD *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–73. MAYMO-MELENDEZ *v.* ALVAREZ-RAMIREZ ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 364 F. 3d 27.

No. 04–76. GRAHAM *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 358 F. 3d 931.

No. 04–77. SMITH, SHERIFF, SMITH COUNTY, TEXAS, ET AL. *v.* KINNEY ET AL.; and

No. 04–86. GREEN, SHERIFF, HARRISON COUNTY, TEXAS, ET AL. *v.* KINNEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 367 F. 3d 337.

No. 04–78. MADE IN THE USA FOUNDATION *v.* PHILLIP FOODS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 365 F. 3d 278.

No. 04–80. ADCO OIL CO. *v.* ROVELL. C. A. 7th Cir. Certiorari denied. Reported below: 357 F. 3d 664.

No. 04–82. WARD, AKA KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 35.

No. 04–84. SARGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–85. GROODY ET AL. *v.* DOE, PARENT AND NATURAL GUARDIAN OF DOE, A MINOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 361 F. 3d 232.

No. 04–88. VARAD *v.* BARSHAK, CHAIRMAN, MASSACHUSETTS BOARD OF BAR EXAMINERS; and VARAD *v.* PAIGE, SECRETARY OF EDUCATION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 93 Fed. Appx. 255 (first judgment).

No. 04–89. WITTMAN *v.* WILSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 752.

No. 04–90. ARNOLD *v.* ARNOLD. Ct. App. Wis. Certiorari denied. Reported below: 270 Wis. 2d 705, 679 N. W. 2d 296.

No. 04–91. W. R. HUFF ASSET MANAGEMENT CO., L. L. C. *v.* BT SECURITIES CORP. ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 891 So. 2d 310.

No. 04–94. MCFARLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 777.

No. 04–96. CORBETT *v.* RUMSFELD, SECRETARY OF DEFENSE. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 882.

No. 04–100. SEIBER ET VIR *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 364 F. 3d 1356.

No. 04–102. RIFENBURY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–106. PREWITT *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 397.

No. 04–109. KITTRELL *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 04–110. LISTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 465.

No. 04–111. THORNTON *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 151.

No. 04–114. J. A. JONES MANAGEMENT SERVICES, INC., T/A JONES MANAGEMENT SERVICES, INC., ET AL. *v.* ROMA ET UX. C. A. 3d Cir. Certiorari denied. Reported below: 344 F. 3d 352.

No. 04–115. CARSON HARBOR VILLAGE, LTD. *v.* CITY OF CARSON, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 353 F. 3d 824.

No. 04–116. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* CAMPBELL ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 98 P. 3d 409.

No. 04–117. ADAMS ET AL. *v.* APOGEE COAL CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 566.

No. 04–119. PARKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 362 F. 3d 1279.

No. 04–122. HOANG VAN TU ET AL. *v.* TERRY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 364 F. 3d 1196.

No. 04–123. BLAZ *v.* BELFER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 368 F. 3d 501.

No. 04–125. KERSEY *v.* SUPREME COURT OF NEW HAMPSHIRE PROFESSIONAL CONDUCT COMMITTEE. Sup. Ct. N. H. Certiorari denied. Reported below: 150 N. H. 585, 842 A. 2d 121.

No. 04–127. GOLD *v.* DEUTSCHE AKTIENGESELLSCHAFT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 365 F. 3d 144.

No. 04–128. HALLMAN, EXECUTRIX OF THE ESTATE OF WALTERS, DECEASED *v.* LEE COUNTY, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 351.

No. 04–129. GANESAN *v.* UNITED STATES ATTORNEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 384.

No. 04–130. GERGOS *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied.

No. 04–133. MEDLOCK *v.* RUMSFELD, SECRETARY OF DEFENSE. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 665.

No. 04–134. GRIGSBY *v.* MIAMI-DADE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 880.

No. 04–135. FOTIADES *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 821 A. 2d 132.

No. 04–136. TENNESSEE LABORERS HEALTH AND WELFARE FUND *v.* RODRIGUEZ. C. A. 6th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 949.

No. 04–138. LIFE INVESTORS INSURANCE COMPANY OF AMERICA *v.* JOHNSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 814.

No. 04–139. LAKE PARK POST, INC., ET AL. *v.* FARMER. Ct. App. Ga. Certiorari denied. Reported below: 264 Ga. App. 299, 590 S. E. 2d 254.

No. 04–140. JIMENA *v.* 111 ZUMA CORP. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–141. KING *v.* ENTERGY OPERATIONS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 470.

No. 04–142. SANTINI ET AL. *v.* CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 342 F. 3d 118.

No. 04–143. BERRY ET AL. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. C. A. 6th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 243.

No. 04–153. MOORE *v.* JUDICIAL INQUIRY COMMISSION OF THE STATE OF ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 891 So. 2d 848.

No. 04–156. NAMEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 364 F. 3d 843.

No. 04–158. CHADWICK *v.* CAULFIELD, WARDEN, ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 834 A. 2d 562.

No. 04–159. REGAN *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 718.

No. 04–160. PAGE *v.* MANTELLO. C. A. 2d Cir. Certiorari denied.

No. 04–164. LOMBARD ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 356 F. 3d 151.

No. 04–171. GADDA *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 363 F. 3d 861.

No. 04–176. MINCH ET AL. *v.* CITY OF CHICAGO, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 363 F. 3d 615.

No. 04–178. DEYNES-TORRES *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–179. THOMPSON ET UX. *v.* HARCO NATIONAL INSURANCE CO. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 120 S. W. 3d 511.

No. 04–182. TALLMADGE *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–187. CASLER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 871 So. 2d 957.

No. 04–189. RIZZO *v.* MICHIGAN. 46th Dist. Ct. Oakland County, Mich. Certiorari denied.

No. 04–191. SMITH *v.* RUSH RETAIL CENTERS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 360 F. 3d 504.

No. 04–199. MACKEY *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 360 F. 3d 463.

No. 04–201. FRANKEL *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 179 N. J. 586, 847 A. 2d 561.

No. 04–203. COTA-MEZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 367 F. 3d 1218.

No. 04–212. RAPIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–213. PARKER *v.* DEPARTMENT OF DEFENSE. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 892.

No. 04–235. JOHNSTON ET AL. *v.* DUDAS, ACTING DIRECTOR, PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 97 Fed. Appx. 335.

No. 04–253. ALLEN *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 59 M. J. 478.

No. 04–258. HILVETY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied.

No. 04–5001. MAYBERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 781.

No. 04–5002. LEWIS *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 351.

No. 04–5003. KULENOVIC *v.* GOOD, ACTING SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5004. NUNEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–5005. PINKERTON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 875 So. 2d 616.

No. 04–5006. RICE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 04–5007. PEARSON *v.* SAAR, SECRETARY, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 156.

No. 04–5008. BATES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5009. BIRDWELL *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 866.

No. 04–5011. J. D. M. *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 04–5012. LITTLEFIELD *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–5013. BELTRAN-RODRIGUEZ *v.* UNITED STATES; MENDEZ-MARTINEZ *v.* UNITED STATES; VASQUEZ-CID *v.* UNITED STATES; and VILLASENOR-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–5014. BROOKS *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5015. BARNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–5016. BRANDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 363 F. 3d 341.

No. 04–5017. BOTTONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 350 F. 3d 59.

No. 04–5018. MEARS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 874 So. 2d 1192.

No. 04–5019. MORA-ZAPATA, AKA COTTO, AKA MORA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 63.

No. 04–5020. MALVERTY *v.* GEORGIA BOARD OF PARDONS AND PAROLES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 715.

No. 04–5021. ALLEN *v.* MITCHELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5022. SHEIKH *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 291.

No. 04–5023. RICHEY *v.* AULT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 04–5024. RUSSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 93 Fed. Appx. 280.

No. 04–5026. BLANTON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 886 So. 2d 850.

No. 04–5027. VEGA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5028. ZARVELA *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 364 F. 3d 415.

No. 04–5030. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–5032. CASTILLO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 120 Nev. 1226, 131 P. 3d 589.

No. 04–5033. CHAPPELL *v.* FARWELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–5034. ABUHOURAN, AKA HOURAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–5035. BERGEN *v.* UNITED STATES; and BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 364 F. 3d 1266 (second judgment); 104 Fed. Appx. 151 (first judgment).

No. 04–5036. BURDEAU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 862.

No. 04–5037. CHEN *v.* APPLIED MATERIALS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 995.

No. 04–5038. RODRIGUEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 139.

No. 04–5039. CARDENA-GARCIA *v.* UNITED STATES; and
No. 04–5045. GARCIA-SUAREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 362 F. 3d 663.

No. 04–5042. JACKSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5043. HUGHES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 769.

No. 04–5044. FYKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 537.

No. 04–5048. SIMS *v.* TANNER. Super. Ct. Fulton County, Ga. Certiorari denied.

No. 04–5050. SHORTRIDGE *v.* VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 33.

No. 04–5051. HOLLY *v.* ANTON. C. A. 7th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 39.

No. 04–5053. FELICIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 91 Fed. Appx. 236.

No. 04–5055. HAYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5056. GEORGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 995.

No. 04–5057. HALE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5058. LEE *v.* WHITE, CHIEF JUSTICE, SUPREME COURT OF MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 04–5059. TANH HUU LAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 892.

No. 04–5060. BRIGGINS *v.* UNICOR FEDERAL PRISON, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 906.

No. 04–5061. CELESTINE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5062. HUDSON *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 351 F. 3d 212.

No. 04–5063. MUSANTE *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–5065. CLARK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 529.

No. 04–5066. ANGEL CHAIREZ *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 04–5067. PALUMBO *v.* ORTIZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 3.

No. 04–5068. ABREU ACEVES *v.* KNOWLES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–5069. PASSARELLI *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5071. THOMAS *v.* MORGAN, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 138.

No. 04–5073. TASSLER *v.* BLOOMBERG ET AL. C. A. 8th Cir. Certiorari denied.

No. 04–5074. BRADLEY *v.* LUEBBERS, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 04–5075. BRUZON *v.* STEARNS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 782.

No. 04–5076. BENNETT *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 04–5078. MILES *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–5079. RINALDO *v.* ROSS. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 223.

No. 04–5080. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 366 F. 3d 376.

No. 04–5081. CHEEK *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., New Hanover County, N. C. Certiorari denied.

No. 04–5082. COLES *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 581.

No. 04–5087. NARANJO *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 60 Mass. App. 1114, 802 N. E. 2d 1069.

No. 04–5089. THORNTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 976.

No. 04–5090. ZURMILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 362 F. 3d 1199.

No. 04–5092. BOLIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 869 So. 2d 1196.

No. 04–5094. RHODES *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 675 N. W. 2d 323.

No. 04–5095. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 367 F. 3d 274.

No. 04–5096. PETTIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–5100. DECICCO *v.* SPENCER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied. Reported below: 96 Fed. Appx. 730.

No. 04–5101. STEWART *v.* KIRSHNER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 277.

No. 04–5102. REEDY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–5103. SHOLES *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 779 N. E. 2d 981.

No. 04–5105. SMITH *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5107. ROBEY *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 90.

No. 04–5108. SISK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 323.

No. 04–5110. LYONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5111. PORTALATIN *v.* PATRICK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5112. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 90 Fed. Appx. 412.

No. 04–5114. MARTINEZ *v.* PASKETT. C. A. 9th Cir. Certiorari denied.

No. 04–5115. PEREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 907.

No. 04–5116. MERCHANT *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5118. XAYASENESOUK *v.* PAYNE, SUPERINTENDENT, MCNEIL ISLAND CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 04–5119. POLK *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 04–5120. ORANGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 151.

No. 04–5122. NAVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 660.

No. 04–5123. RICE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 904.

No. 04–5124. BRYANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5125. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–5126. FERRARIO-POZZI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 368 F. 3d 5.

No. 04–5127. HYMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 265.

No. 04–5128. HAYES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 476.

No. 04–5131. GOINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 675.

No. 04–5133. GRAHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 511.

No. 04–5134. HOLLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 176.

No. 04–5135. FIELDS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–5136. PAPESKOV *v.* DIMITROVA ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–5140. HULTZ *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 04–5141. GEORGE *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5142. GRETHEN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 04–5143. DENNIS *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5144. ANDRADES ET AL. *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 113 Cal. App. 4th 817, 7 Cal. Rptr. 3d 74.

No. 04–5145. CLUCK *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 04–5146. MOSLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–5147. BOOSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 377.

No. 04–5148. WARREN *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–5149. WALKER *v.* VAUGHN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5150. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 876.

No. 04–5151. ALLEN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5153. SEALED PETITIONER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 356 F. 3d 313.

No. 04–5157. FENNER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 381 Md. 1, 846 A. 2d 1020.

No. 04–5158. FERNS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 343 Ill. App. 3d 1285, 856 N. E. 2d 688.

No. 04–5159. HIGGINS *v.* BUREAU OF CUSTOMS ET AL. C. A. 4th Cir. Certiorari denied.

No. 04–5162. ROUSSAW *v.* HALL, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 04–5163. MEDICINE BLANKET *v.* ROSEBUD SIOUX TRIBAL POLICE DEPARTMENT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 533.

No. 04–5164. TURNER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5165. BEAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 04–5166. CLELLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–5167. HOPKINS *v.* JAMROG, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–5168. DAVIS *v.* AULT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 04–5170. EARLEY *v.* KEENAN. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 959.

No. 04–5172. BILLY, AKA WANGUE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 56.

No. 04–5175. MOORE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 363 F. 3d 631.

No. 04–5176. SENATOR *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 04–5177. BARTON *v.* RUECHEL. C. A. 9th Cir. Certiorari denied.

No. 04–5178. SANDERS *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 47.

No. 04–5179. GREGORY ET UX. *v.* BRALY FAMILY, LLC, ET AL. Ct. App. Colo. Certiorari denied.

No. 04–5180. HEUSS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 871 So. 2d 892.

No. 04–5181. MYRON *v.* KRALIK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 5 App. Div. 3d 707, 774 N. Y. S. 2d 744.

No. 04–5182. BLACKWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–5183. GORE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–5184. LAINO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 32 Cal. 4th 878, 87 P. 3d 27.

No. 04–5185. BLACK *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 114 Cal. App. 4th 830, 7 Cal. Rptr. 3d 902.

No. 04–5186. JEREMIAH-NJIRIMANI *v.* HARBORVIEW MEDICAL CENTER ET AL. Ct. App. Wash. Certiorari denied.

No. 04–5192. RYDER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 83 P. 3d 856.

No. 04–5195. MENDEZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5196. CORONADO-PINEDA *v.* UNITED STATES (Reported below: 95 Fed. Appx. 116); ROJAS-HERNANDEZ *v.* UNITED STATES (95 Fed. Appx. 657); IRACHETA-REYNA *v.* UNITED STATES (95 Fed. Appx. 659); LOERA-GARCIA *v.* UNITED STATES (95 Fed. Appx. 597); GUERRERO-MORALES *v.* UNITED STATES (95 Fed. Appx. 660); COLINDRES *v.* UNITED STATES (98 Fed. Appx. 347); CERVANTES-ESPINO *v.* UNITED STATES (95 Fed. Appx. 641); BERRELLESA-

ORTEGA, AKA URREA-GUTIERREZ *v.* UNITED STATES (95 Fed. Appx. 642); ACIAIN-PORRAS *v.* UNITED STATES (95 Fed. Appx. 581); GONZALEZ-ARZOLA, AKA FRANCISCO GONZALEZ, AKA GONZALEZ *v.* UNITED STATES (95 Fed. Appx. 643); CASERES-RODRIGUEZ *v.* UNITED STATES (95 Fed. Appx. 629); CORTEZ-CAVAZOS *v.* UNITED STATES (95 Fed. Appx. 646); MALDONADO-ALAMEDA *v.* UNITED STATES (95 Fed. Appx. 579); ACOSTA-MENDOZA *v.* UNITED STATES (95 Fed. Appx. 647); AGUILAR *v.* UNITED STATES (95 Fed. Appx. 663); LOPEZ-PENA *v.* UNITED STATES (95 Fed. Appx. 634); ALMANZA-TAPIA *v.* UNITED STATES (95 Fed. Appx. 697); and GONZALEZ-MELENDEZ *v.* UNITED STATES (95 Fed. Appx. 653). C. A. 5th Cir. Certiorari denied.

No. 04–5198. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 793.

No. 04–5199. BRYANT *v.* HOWES. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 04–5201. HANSEN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 04–5202. MORGAN *v.* CALDERON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5203. MILO *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5204. LATEEF *v.* CALIFORNIA BOARD OF PRISON TERMS. C. A. 9th Cir. Certiorari denied.

No. 04–5205. ADKINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 04–5206. LANDAU *v.* VASTINE-SMITH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 969.

No. 04–5207. JACKSON *v.* MILLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 921.

No. 04–5208. VALENZUELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 358 F. 3d 1194.

No. 04–5209. WALLACE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 985.

No. 04–5211. WEST, AKA GREEN, *v.* UNITED STATES; and No. 04–5218. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 683.

No. 04–5212. THOMPSON *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–5213. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 791.

No. 04–5216. WATERFIELD *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 04–5217. HAMMON *v.* DANIELS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5219. BURKE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5221. DIETELBACH *v.* OHIO EDISON CO. C. A. 6th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 84.

No. 04–5223. GROSS *v.* OHIO. Ct. App. Ohio, Muskingum County. Certiorari denied.

No. 04–5224. GRASTY *v.* WOLFE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5225. SKILLERN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 266 Ga. App. XXIV.

No. 04–5227. RUSH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 667.

No. 04–5228. SUDDUTH, AKA MUHAMMAD *v.* MARTINEZ, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5229. RIEBSAME *v.* PRINCE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 656.

No. 04–5230. RODRIGUEZ *v.* TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 100 N. Y. 2d 532, 791 N. E. 2d 959.

No. 04–5231. FARROW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 364 F. 3d 551.

No. 04–5232. WILBURN *v.* EASTMAN KODAK ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–5234. VASCONCELLOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–5235. GALINDO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 160.

No. 04–5236. WILKINS *v.* CALBONE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–5237. UGOCHUKWU *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5238. WEBB *v.* PENNINGTON COUNTY BOARD OF COMMISSIONERS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 983.

No. 04–5240. WHITMORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–5241. BARBER *v.* OFFICE OF INFORMATION AND PRIVACY, DEPARTMENT OF JUSTICE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 04–5242. RUDAN *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5243. SANTOS-ALICEA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–5244. WAGSTAFF *v.* PALAKOVICH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5245. CALLAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 299.

No. 04–5246. KEELING *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5248. BUCHANAN *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5252. CRAVER *v.* CAMPBELL & TAYLOR. Ct. App. N. C. Certiorari denied. Reported below: 160 N. C. App. 708.

No. 04–5253. DONAHOU *v.* DONAHOU. Ct. Civ. App. Okla. Certiorari denied.

No. 04–5254. DAVIS *v.* WILLIAMS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–5255. DIAZ *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5256. DINKINS *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–5257. CUELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 357 F. 3d 162.

No. 04–5258. DIAZ-RIVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 622.

No. 04–5259. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 201.

No. 04–5260. CAPELTON, AKA COLEMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 350 F. 3d 231.

No. 04–5261. CLARK *v.* BASSETT, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 04–5264. MORALES-PALACIOS, AKA RESENDIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 588.

No. 04–5265. RICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 921.

No. 04–5266. ROBINSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 197.

No. 04–5267. ROMERO *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 242.

No. 04–5268. TREVINO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5269. PRICE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 792.

No. 04–5270. WILLARD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5271. BILBREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5273. VETA *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 04–5274. HARRIS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5275. KING *v.* ELLINGBURG ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 104.

No. 04–5276. LYNN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 365 F. 3d 1225.

No. 04–5277. LAZO-RAYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 577.

No. 04–5278. LIGON *v.* BOSWELL. C. A. 11th Cir. Certiorari denied.

No. 04–5279. JACKSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 267 Va. 178, 590 S. E. 2d 520.

No. 04–5281. WATSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 381.

No. 04–5282. VILLARREAL-FUENTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 596.

No. 04–5283. CARROLL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5284. ARNESON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 666.

No. 04–5285. CANTU-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 705.

No. 04–5287. DEYOUNG *v.* SCHOFIELD, WARDEN. Super. Ct. Butts County, Ga. Certiorari denied.

No. 04–5290. PUIG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 665.

No. 04–5291. MCADOO *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 365 F. 3d 487.

No. 04–5292. DANIELS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 228.

No. 04–5294. MENDOZA-CABALLERO ET AL. *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 543.

No. 04–5299. ONUOHAH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 82.

No. 04–5300. MCGEE *v.* MCDONALD'S RESTAURANTS OF CALIFORNIA, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 63 Fed. Appx. 409.

No. 04–5301. RUSH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 695.

No. 04–5303. RILEY *v.* KURTZ. C. A. 6th Cir. Certiorari denied. Reported below: 361 F. 3d 906.

No. 04–5304. ARREDONDO *v.* ORTIZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 365 F. 3d 778.

No. 04–5307. NIETO-CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 703.

No. 04–5309. MANN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 868 So. 2d 524.

No. 04–5310. KAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 871.

No. 04–5311. BELCHER *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 04–5312. POWELL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 267 Va. 107, 590 S. E. 2d 537.

No. 04–5313. MEANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5314. L'HEUREUX *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–5315. LARRY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 361 F. 3d 890.

No. 04–5316. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5317. PIMENTEL *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–5319. CHRISTOPHER *v.* TRANSIT INSURANCE GROUP. Cir. Ct. Baltimore County, Md. Certiorari denied.

No. 04–5320. CARNOHAN *v.* NEWCOMB. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 04–5321. OCHOA CANALES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5322. STEELE *v.* MURPHY, SUPERINTENDENT, MASSACHUSETTS TREATMENT CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 365 F. 3d 14.

No. 04–5324. SPARKS *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 336 Ore. 298, 83 P. 3d 304.

No. 04–5325. MCCREARY *v.* JEFFERSON SMURFIT CORP. C. A. 11th Cir. Certiorari denied. Reported below: 49 Fed. Appx. 289.

No. 04–5326. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 185.

No. 04–5328. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 608.

No. 04–5329. BRIDGMAN *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 370.

No. 04–5334. REINHOLT *v.* REINHOLT. Sup. Ct. Fla. Certiorari denied. Reported below: 868 So. 2d 524.

No. 04–5335. SATTERFIELD *v.* HUSKEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5336. MCKENZIE *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5338. ATCHERLEY *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 04–5339. RODRIGUEZ *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–5341. MORALES *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied.

No. 04–5342. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5343. CAIN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–5344. COYAZO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 261.

No. 04–5345. ADAMS *v.* ROSEMEYER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT LAUREL HIGHLANDS. C. A. 3d Cir. Certiorari denied.

No. 04–5346. EVANS *v.* YOUNG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 611.

No. 04–5347. ORTEGA *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–5348. PEPPERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 95 Fed. Appx. 406.

No. 04–5350. BARBER *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 04–5351. SPITZNAS *v.* BOONE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 820.

No. 04–5353. MILLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 666.

No. 04–5354. McBRIDE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5355. MORGAN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5356. ORTIZ *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 835 A. 2d 835.

No. 04–5357. AUSTIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 847 A. 2d 391.

No. 04–5359. MATEO-ROJAS *v.* UNITED STATES; and MELO OSORIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 624 (second judgment) and 627 (first judgment).

No. 04–5360. LAZENBY *v.* LEXUS OF CLEAR LAKE. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 558.

No. 04–5361. OUTLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5362. ESTEP *v.* SPENCER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 04–5364. CHAVFUL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 226.

No. 04–5366. COSSYLEON-BECERRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 47 Fed. Appx. 455.

No. 04–5367. DENNIS *v.* MITCHEM, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–5368. NEELY *v.* DiGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5369. DAVIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 04–5370. COX *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 855 So. 2d 142.

No. 04–5371. COMBS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–5373. ZOCHLINSKI *v.* HANDY ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 04–5375. WILLIAMS *v.* RUSHTON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 04–5376. TUCKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 103 Fed. Appx. 417.

No. 04–5377. VILLEGAS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 04–5378. WELLS *v.* JOHNSON, JUDGE, JUVENILE COURT OF LOUISIANA, EAST BATON ROUGE PARISH. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 864 So. 2d 905.

No. 04–5379. WASKO *v.* GONZALES. Ct. App. N. M. Certiorari denied.

No. 04–5380. WYNTER *v.* BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–5381. WATSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–5382. VOELKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–5383. WAHAB *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5384. ROBERTS *v.* UNIVERSITY OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 969.

No. 04–5385. WRIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 83 Fed. Appx. 432.

No. 04–5387. OWENS *v.* MISSOURI DEPARTMENT OF SOCIAL SERVICES, DIVISION OF CHILDREN'S SERVICES, ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 131 S. W. 3d 782.

No. 04–5389. MUNGUIA-SANCHEZ, AKA MANGUIA-SANCHEZ, AKA SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 365 F. 3d 877.

No. 04–5390. STEVENSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 604.

No. 04–5391. RUBALCABA *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 04–5393. STOKES *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5394. SCOTT *v.* ANDREWS, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–5395. MORALES *v.* TADLOCK, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5396. PEARSON *v.* PEGUESE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 161.

No. 04–5397. SLOAN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5398. BODDIE *v.* RAY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 184.

No. 04–5399. DAVILA *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 75 Conn. App. 432, 816 A. 2d 673.

No. 04–5400. DOLENZ *v.* UNITED STATES EX REL. BOUNDY. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 992.

No. 04–5401. EVANS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied.

No. 04–5402. CURRIE *v.* BLANKS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 644.

No. 04–5403. CLEMENTS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 655.

No. 04–5405. CRISAMORE *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5406. ESTEBAN GUERRERO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 140.

No. 04–5407. HEWITT *v.* EARLY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5408. BROWN *v.* HICKS, CLERK, SUPERIOR COURT OF GEORGIA, ATLANTA JUDICIAL CIRCUIT, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5409. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 253.

No. 04–5410. CALHOUN-EL *v.* PEGUESE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 183.

No. 04–5412. DEVALLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 906.

No. 04–5413. DAVIS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5414. REYNOLDS *v.* BARNES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 672.

No. 04–5415. BACA SANCHEZ *v.* RAWERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5416. SHIPLEY *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5417. BURRELL *v.* CARLTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–5418. SPEIGHTS *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 361 F. 3d 962.

No. 04–5419. RANDOLPH *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5420. SIMUEL *v.* COOPER, ATTORNEY GENERAL OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 971.

No. 04–5421. STIDHAM *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 874 So. 2d 1193.

No. 04–5422. SMITH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–5423. MARQUEZ *v.* WORKMAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 04–5424. LINDSEY *v.* FEDERAL BUREAU OF INVESTIGATION OFFICES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 654.

No. 04–5425. LUI *v.* HENRY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5427. DEAN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5428. BENITEZ-BENITEZ *v.* UNITED STATES; and RAMIREZ-IBARRA, AKA ROSARIO, AKA RAMIREZ, AKA CRUZ ROSARIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 639 (second judgment) and 670 (first judgment).

No. 04–5430. SINGLETON *v.* JONES. C. A. 5th Cir. Certiorari denied.

No. 04–5433. PINEDA-CISNEROS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 609.

No. 04–5434. MERCADO-LUJAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 655.

No. 04–5437. NORMAN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–5438. LIGON *v.* BOSWELL. C. A. 11th Cir. Certiorari denied.

No. 04–5439. MARTINEZ-CANIZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 649.

No. 04–5443. URIBE-JIMENEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 86.

No. 04–5445. TOWNSEND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 118.

No. 04–5446. ACOSTA-FLORES *v.* UNITED STATES (Reported below: 95 Fed. Appx. 591); AMADOR-LUJAN *v.* UNITED STATES (95 Fed. Appx. 572); BOJORQUEZ-LUCERO *v.* UNITED STATES (95 Fed. Appx. 677); CHAVEZ-RENTERIA *v.* UNITED STATES (95 Fed. Appx. 686); DELEON-ARTEAGA *v.* UNITED STATES (95 Fed. Appx. 694); DELGADO-NAJERA *v.* UNITED STATES (95 Fed. Appx. 576); FERRAL-TAMEZ *v.* UNITED STATES (95 Fed. Appx. 691); GALLEGOS-RENTERIA *v.* UNITED STATES (95 Fed. Appx. 668); GARCIA-RAMIREZ *v.* UNITED STATES (95 Fed. Appx. 693); GARCIA-RUBIO *v.* UNITED STATES (95 Fed. Appx. 567); GUERRA-GARCIA *v.* UNITED STATES (95 Fed. Appx. 672); GUTIERREZ-ENRIQUEZ *v.* UNITED STATES (95 Fed. Appx. 616); HERNANDEZ-MUNOZ *v.* UNITED STATES (95 Fed. Appx. 569); LAGUNAS-SANCHEZ *v.* UNITED STATES (95 Fed. Appx. 620); LEMUS-ALVAREZ *v.* UNITED STATES (95 Fed. Appx. 573); LOPEZ-REYES *v.* UNITED STATES (95 Fed. Appx. 675); MADRIGAL-OCHOA *v.* UNITED STATES (95 Fed. Appx. 575); MARTINEZ-MENDOZA *v.* UNITED STATES (95 Fed. Appx. 678); MENDEZ-AGUILAR *v.* UNITED STATES (95 Fed. Appx. 584); MORENO-CONTRERAS *v.* UNITED STATES (95 Fed. Appx. 614); NUNEZ-CERDA *v.* UNITED STATES (95 Fed. Appx. 696); PALACIOS-RIVERA *v.* UNITED STATES (96 Fed. Appx. 189); RIVERA-CARRILLO *v.* UNITED STATES (95 Fed. Appx. 618); RUIZ-PEREZ *v.* UNITED STATES (95 Fed. Appx. 698); SEPULVERA-DIAZ *v.* UNITED STATES (95 Fed. Appx. 665); VENCES-GONZALEZ *v.* UNITED STATES (95 Fed. Appx. 619); and VIDALES-LOPEZ *v.* UNITED STATES (95 Fed. Appx. 574). C. A. 5th Cir. Certiorari denied.

No. 04–5447. LOPEZ-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 114.

No. 04–5449. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 453.

No. 04–5452. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 446.

No. 04–5454. ANTUNEZ-PINEDA *v.* UNITED STATES; RENTERIA-BARRIENTOS *v.* UNITED STATES; MENA-MONTOYA *v.* UNITED STATES; MARTINEZ-VENCES *v.* UNITED STATES;

SALGADO-DIAZ *v.* UNITED STATES; and VELASQUEZ-MEZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 568 (fourth judgment), 592 (first judgment), 617 (fifth judgment), 682 (sixth judgment), 683 (second judgment), and 688 (third judgment).

No. 04–5455. MOORE *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 914.

No. 04–5457. LOPEZ-LABASTIDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 116.

No. 04–5458. MACIAS-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 202.

No. 04–5459. MUNOZ-PERALTA, AKA ESTRADA GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 719.

No. 04–5460. BEMIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 423.

No. 04–5461. IRIZARRY SANABRIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5464. HURLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 452.

No. 04–5467. MCCUTTING *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 04–5468. GIBSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 848 A. 2d 616.

No. 04–5472. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 661.

No. 04–5473. FANNIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 234.

No. 04–5475. PIERCE *v.* WRIGHT, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 38.

No. 04–5477. RICHARDSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS

DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 394.

No. 04–5478. BROWN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5479. SANTIAGO *v.* HINSLEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 74.

No. 04–5480. RUBEN *v.* PHOENIX POLICE DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–5482. GRIEGO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 781.

No. 04–5483. GERONIMO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 664.

No. 04–5484. GONZALEZ-CLEMENTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 79.

No. 04–5486. HALL *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 829.

No. 04–5487. HOPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 134 Fed. Appx. 781.

No. 04–5489. FERMIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 96 Fed. Appx. 35.

No. 04–5490. HUDGENS *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 706.

No. 04–5491. BLOOME *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 730.

No. 04–5492. ACOSTA-MARTINEZ *v.* UNITED STATES; GONZALEZ-FLOTA *v.* UNITED STATES; GUZMAN-SANCHEZ *v.* UNITED STATES; HERNANDEZ-ALVAREZ *v.* UNITED STATES; NORIEGA-CISNEROS, AKA NORIEGA, ET AL. *v.* UNITED STATES; ORTIZ-GALINDO *v.* UNITED STATES; PASILLAS-MARTINEZ *v.* UNITED STATES; and SOLORZANO-PALMAS, AKA SOLORZANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported

below: 95 Fed. Appx. 108 (seventh judgment), 621 (first judgment), 622 (fifth judgment), 636 (eighth judgment), 679 (sixth judgment), 680 (fourth judgment), and 681 (third judgment); 96 Fed. Appx. 190 (second judgment).

No. 04–5494. LUCAS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 100.

No. 04–5495. JOHNSON *v.* CAMBRA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 359.

No. 04–5496. ANDERSON *v.* SOWDERS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 944.

No. 04–5498. LAFOUNTAIN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 880 So. 2d 1225.

No. 04–5499. LAMPKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–5500. KING *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–5503. KNIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 875.

No. 04–5505. DUNBAR *v.* CONNECTICUT COMMISSIONER OF MOTOR VEHICLES. App. Ct. Conn. Certiorari denied.

No. 04–5506. DELGADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–5507. CROSSLAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–5508. DEGLACE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 880.

No. 04–5509. AMILPAS-WENCES, AKA AMILPAS-BENITEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 711.

No. 04–5510. WILLIAMS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 215 W. Va. 201, 599 S. E. 2d 624.

No. 04–5511. TRUAX *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 570.

No. 04–5512. WADE *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 776.

No. 04–5513. WATTS *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 356 F. 3d 937.

No. 04–5514. TAMAKLOE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–5515. WASHINGTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–5518. LEWIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 267 Va. 302, 593 S. E. 2d 220.

No. 04–5519. PERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 598.

No. 04–5521. AKBAR *v.* SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 28.

No. 04–5522. DAVIS *v.* COKER COURT REPORTING, INC., ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5524. RING *v.* APPLETON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 993.

No. 04–5526. THOMPSON *v.* TISCHLER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 970.

No. 04–5527. THOMPSON *v.* CALDWELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 970.

No. 04–5529. JONES *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 178.

No. 04–5530. K. E. *v.* FLORIDA BOARD OF BAR EXAMINERS. Sup. Ct. Fla. Certiorari denied.

No. 04–5531. BRIGHT *v.* SHANNON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 89 Fed. Appx. 802.

No. 04–5532. DENNIS *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 986.

No. 04–5533. LIVERPOOL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 852 A. 2d 962.

No. 04–5534. DE LA CRUZ-OCHOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 150.

No. 04–5535. COLEMAN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5536. COLLIER *v.* HOME DEPOT. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 656.

No. 04–5537. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 344 Ill. App. 3d 1217, 859 N. E. 2d 318.

No. 04–5538. SPEARMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–5539. BOND *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–5542. WATTERS *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied.

No. 04–5544. ST. YVES *v.* MERRILL, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 78 Fed. Appx. 136.

No. 04–5547. SMITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–5548. STEWART *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 04–5549. JENNINGS *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5550. MILLER *v.* TERRY, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5551. MILLER-BEY *v.* PARKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–5552. LEMAN *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5553. SIMONS *v.* UNIVERSITY OF TULSA COLLEGE OF LAW ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–5554. THOMPSON *v.* NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL. C. A. 8th Cir. Certiorari denied.

No. 04–5556. TABOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 284.

No. 04–5557. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–5559. WOOTEN *v.* BATES. C. A. 6th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 14.

No. 04–5561. WALKER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 859 A. 2d 651.

No. 04–5563. CLARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–5565. CANNON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 336.

No. 04–5566. CASHWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 574.

No. 04–5567. CAUSER *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 678 N. W. 2d 552.

No. 04–5569. ALLEN *v.* POLK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 366 F. 3d 319.

No. 04–5572. MEZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 215.

No. 04–5573. MEYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 359 F. 3d 820.

No. 04–5576. TRUJILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–5580. CALHOUN, AKA MARTIN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 98 Fed. Appx. 840.

No. 04–5581. CHAVARRIYA-MEJIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 367 F. 3d 1249.

No. 04–5583. PATTERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 97 Fed. Appx. 389.

No. 04–5585. PORTILLO-AMAYA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 151.

No. 04–5591. JONES *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 277 Kan. ix, 89 P. 3d 656.

No. 04–5597. BERBER-CHAVEZ *v.* UNITED STATES; HERRERA-SUAREZ, AKA SANTANA *v.* UNITED STATES; PONCE-HERNANDEZ *v.* UNITED STATES; RODRIGUEZ-HERNANDEZ *v.* UNITED STATES; and SANCHEZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–5598. YOUNG *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5600. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 561.

No. 04–5602. JONES, AKA JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 576.

No. 04–5603. MAJID *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 04–5604. KANIADAKIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–5605. BOYCE *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 658.

No. 04–5609. MURPHY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 04–5611. PALMER *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5613. ALEJANDRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 368 F. 3d 130.

No. 04–5615. TURNER *v.* GEORGETOWN UNIVERSITY LAW CENTER. Ct. App. D. C. Certiorari denied.

No. 04–5619. THOMAS *v.* MCBRIDE, WARDEN. Cir. Ct. Monongalia County, W. Va. Certiorari denied.

No. 04–5622. DONOVAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–5625. CONFORTI *v.* MILLER, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–5626. CORBEIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 662.

No. 04–5627. ELLIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–5629. WILKERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 361 F. 3d 717.

No. 04–5638. WEINLEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–5640. SMITH *v.* *NSYNC ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5643. VOLITON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 381.

No. 04–5644. BRENNAN *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied. Reported below: 100 Fed. Appx. 4.

No. 04–5648. FREGOSO, AKA FREGOSO GUADALUPE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 358 F. 3d 1221.

No. 04–5649. HIGHSMITH *v.* GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 04–5650. IZUEL *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 972.

No. 04–5651. GOLJAH-MOFRAD *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 233.

No. 04–5654. ETTIENNE *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied.

No. 04–5658. SOTO *v.* CIRCUIT COURT OF ILLINOIS, COOK COUNTY. Sup. Ct. Ill. Certiorari denied.

No. 04–5663. FALCONE *v.* RHODE ISLAND ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–5665. HATFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 365 F. 3d 332.

No. 04–5669. HEMPHILL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 985.

No. 04–5670. BROWNE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 96 Fed. Appx. 40.

No. 04–5672. R. J. S. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 366 F. 3d 960.

No. 04–5682. JENSEN *v.* SCHUETZLE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 04–5685. GONZALEZ QUINTANA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–5688. GRIMM *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–5690. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 233.

No. 04–5691. STEVENS *v.* MEACHAM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 588.

No. 04–5693. DUMBRIQUE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 978.

No. 04–5696. DRAKEFORD *v.* NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. Ct. App. N. Y. Certiorari denied. Reported below: 2 N. Y. 3d 779, 812 N. E. 2d 1253.

No. 04–5697. CARMICKEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–5698. SIMON *v.* FEDERAL PRISON INDUSTRIES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 91 Fed. Appx. 161.

No. 04–5704. TURNS *v.* UNITED STATES;
No. 04–5739. CROCKETT *v.* UNITED STATES; and
No. 04–5890. BEVERLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 369 F. 3d 516.

No. 04–5711. LUMPKIN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5718. MALONEY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 969.

No. 04–5725. ROCHESTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 667.

No. 04–5727. BALDERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 354.

No. 04–5731. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 364 F. 3d 556.

No. 04–5733. TENNEY *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 347 Ill. App. 3d 359, 807 N. E. 2d 705.

No. 04–5737. GORGONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 49.

No. 04–5746. BURNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–5754. DELGADO *v.* DEPARTMENT OF JUSTICE, BUREAU OF PRISONS. C. A. 5th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 348.

No. 04–5761. LOMELI GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 365 F. 3d 796.

No. 04–5766. CANNON *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–5767. COX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–5773. RANSOM *v.* CORONA. C. A. 9th Cir. Certiorari denied.

No. 04–5780. GRAHAM *v.* WEBBER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 102.

No. 04–5782. GRINER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 870 So. 2d 821.

No. 04–5783. HEBERT *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–5787. FOSTER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–5789. FONVILLE *v.* FLEMING, SUPERINTENDENT, MONROE CORRECTIONAL COMPLEX. C. A. 9th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 765.

No. 04–5790. GRANT *v.* MILLER, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 87 Fed. Appx. 764.

No. 04–5792. GIVENS *v.* WEST VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 39.

No. 04–5797. LUNA *v.* ROCHE, SECRETARY OF THE AIR FORCE. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 878.

No. 04–5798. SCHOPPERT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 362 F. 3d 451.

No. 04–5800. JACKSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied.

No. 04–5803. AGUIRRE-ESPINOZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 244.

No. 04–5812. FULTZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–5817. HOWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–5821. GIBSON *v.* IDAHO STATE TAX COMMISSION. Ct. App. Idaho. Certiorari denied. Reported below: 140 Idaho 346, 92 P. 3d 1093.

No. 04–5824. HINTON, AKA ABDUS-SALAAM *v.* MOORE, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5825. HARDY *v.* UNITED STATES (two judgments). C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 301 (second judgment); 92 Fed. Appx. 958 (first judgment).

No. 04–5827. CRUZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 644.

No. 04–5828. CHAPA-IBARRA, AKA IBARRA CHAPA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 973.

No. 04–5832. MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 598.

No. 04–5840. FOUCHE *v.* SLADE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5843. MUHAMMAD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–5844. SARBIA, AKA VIZCARRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 367 F. 3d 1079.

No. 04–5861. OGLETREE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 210.

No. 04–5862. GALDI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 146.

No. 04–5869. ACOSTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 152.

No. 04–5873. WOODARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 131.

No. 04–5874. THOMAS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 772 A. 2d 818.

No. 04–5875. WEARRY *v.* BLAINE ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5877. HOUGH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 100 Fed. Appx. 97.

No. 04–5880. LONGLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–5882. RICH *v.* HATIN, SUPERINTENDENT, NORTHWEST STATE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 369 F. 3d 83.

No. 04–5888. CRAGER *v.* MEYERS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5896. HEARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 367 F. 3d 1275.

No. 04–5900. HAIRSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 875.

No. 04–5904. CHANDLER *v.* POLK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 830.

No. 04–5906. CLAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 388.

No. 04–5909. RIGGANS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 891.

No. 04–5911. AREVALO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 589.

No. 04–5913. ALVEREZ, AKA ALVAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5914. GREEN *v.* BROWNLEE, ACTING SECRETARY OF THE ARMY. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 902.

No. 04–5919. COOPER *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5920. EDMOND *v.* NIGHTHAWK SYSTEMS, INC., ET AL. Ct. App. Colo. Certiorari denied.

No. 04–5923. BLOM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–5925. CAMPBELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5927. ESCOBAR DE JESUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 102 Fed. Appx. 768.

No. 04–5932. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–5935. GONEY, AKA HARRIS, AKA THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 97 Fed. Appx. 396.

No. 04–5936. MICHAU *v.* TAYLOR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 770.

No. 04–5940. SLICER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 361 F. 3d 1085.

No. 04–5941. REDMOND *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 829 A. 2d 229.

No. 04–5949. BARBER *v.* DEPARTMENT OF JUSTICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 04–5952. ALCANTAR-CHAIDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 489.

No. 04–5954. BELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 371 F. 3d 239.

No. 04–5962. BOGGS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–5964. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–5966. BECK *v.* BOWERSOX, SUPERINTENDENT, SOUTH CENTRAL CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 362 F. 3d 1095.

No. 04–5967. PUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 490.

No. 04–5968. MCKENZIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 164.

No. 04–5971. BEW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 554.

No. 04–5973. JOYCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 357 F. 3d 921.

No. 04–5988. WEBBER *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–5991. TUCKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 99 Fed. Appx. 328.

No. 04–5992. UDOGWU ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–5994. CRUM *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 04–5997. CROCKETT, AKA NEILL, AKA POPE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 285.

No. 04–6000. ADEDOYIN, AKA OMOADEDOYIN, AKA FAMAKINDE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 369 F. 3d 337.

No. 04–6003. BROWN *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 04–6010. GRAY-BEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–6011. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 369 F. 3d 1157.

No. 04–6018. GARCIA-GONZALES ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 665.

No. 04–6024. GREENUP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 167.

No. 04–6025. MOSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–6028. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 960.

No. 04–6031. LOCUST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 507.

No. 04–6034. JARVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 877.

No. 04–6040. PRIETO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–6048. PAYNE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 204.

No. 04–6053. BARNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–6056. LILES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 519.

No. 04–6058. SOWERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6075. BOLDEN *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 93 Fed. Appx. 322.

No. 04–6090. AREVALO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–1410. BANK UNITED ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 80 Fed. Appx. 663.

No. 03–1431. HOSPITALITY MANAGEMENT ASSOCIATES, INC., ET AL. *v.* SHELL OIL CO., DBA SHELL CHEMICAL CO., ET AL. Sup. Ct. S. C. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 356 S. C. 644, 591 S. E. 2d 611.

No. 03–1482. ASSA'AD-FALTAS *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 332 F. 3d 1321.

No. 03–1496. RANEY *v.* ALLSTATE INSURANCE CO. ET AL. C. A. 11th Cir. Certiorari before judgment denied.

No. 03–1498. PAYNE *v.* RILEY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 352 F. 3d 1313.

No. 03–1505. MILLER ET AL. *v.* PFIZER, INC. (ROERIG DIVISION). C. A. 10th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 356 F. 3d 1326.

No. 03–1522. DURRUTHY *v.* PASTOR. C. A. 11th Cir. Motion of National Press Photographers Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 351 F. 3d 1080.

No. 03–1543. RICHARD *v.* HOECHST CELANESE CHEMICAL GROUP, INC., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 355 F. 3d 345.

No. 03–1586. BOURNE, A MINOR, BY AND THROUGH HIS PARENTS, NEXT FRIENDS AND NATURAL GUARDIANS, BOURNE ET AL. *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 4th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 85 Fed. Appx. 964.

No. 03–1644. CANDELARIO-RAMOS ET AL. *v.* BAXTER HEALTHCARE CORPORATION OF PUERTO RICO ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 360 F. 3d 53.

No. 03–1648. HANNA *v.* INFOTECH CONTRACT SERVICES, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 91 Fed. Appx. 737.

No. 03–1688. PT PERTAMINA (PERSERO), FKA PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA *v.* KARAHA

BODAS CO., L. L. C. C. A. 5th Cir. Motion of Republic of Indonesia for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 364 F. 3d 274.

No. 03–10177. HOLLIS-ARRINGTON *v.* CENDANT MORTGAGE CORP. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR and JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 03–10325. ORTIZ DIAMOND *v.* BANK OF AMERICA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 03–10438. BOKIN *v.* SCHWARZENEGGER, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 03–10527. KLAT *v.* CALIFORNIA BOARD OF REGISTERED NURSING. Ct. App. Cal., 3d App. Dist. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 03–10721. KLAT *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 03–11033. COLLIER *v.* ZAGEL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari before judgment denied.

No. 04–14. AIR LIQUIDE AMERICA L. P., FKA AIR LIQUIDE AMERICA CORP., ET AL. *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 359 F. 3d 358.

No. 04–43. HING QUAN LUM ET AL. *v.* BANK OF AMERICA ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 361 F. 3d 217.

No. 04–44. BURLINGTON NORTHERN & SANTA FE RAILWAY CO. *v.* RAMSEY. Ct. App. Mo., Eastern Dist. Motion of Associa-

tion of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 130 S. W. 3d 646.

No. 04–124. KANT ET UX. *v.* BREGMAN, BERBERT & SCHWARTZ, L. L. C. C. A. 4th Cir. Motion of Property Rights Foundation of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 84 Fed. Appx. 355.

No. 04–147. POLK, WARDEN *v.* ALLEN. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 366 F. 3d 319.

No. 04–192. DE ARMAS ET AL. *v.* KINGSLAND. C. A. 11th Cir. Motion of petitioners to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 369 F. 3d 1210.

No. 04–266. MORRIS COMMUNICATIONS CO., LLC *v.* PGA TOUR, INC. C. A. 11th Cir. Motion of American Society of Newspaper Editors et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 364 F. 3d 1288.

No. 04–5093. MILLER *v.* VANNATTA, SUPERINTENDENT, MIAMI CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari before judgment denied.

No. 04–5138. GREEN *v.* RAWERS, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 100 Fed. Appx. 635.

No. 04–5139. JONES *v.* BOSTON HOUSING AUTHORITY ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 04–5197. METZSCH *v.* AVAYA, INC. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 04–5297. HUICOCHEA MEJIA *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner to consolidate this case with No. 04–104, *United States* v. *Booker,* and No. 04–105, *United States* v. *Fanfan* [certiorari granted, 542 U. S. 956], denied. Certiorari denied. Reported below: 104 Fed. Appx. 152.

No. 04–5759. MILLER *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

Rehearing Denied

No. 03–9760. JOHNSON *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, 542 U. S. 906;

No. 03–9984. JOHNSON *v.* ILLINOIS, 542 U. S. 940;

No. 03–10168. PHELPS ET UX. *v.* NATIONWIDE INSURANCE CO., 542 U. S. 942; and

No. 03–10267. ROJAS AFANADOR *v.* UNITED STATES, 542 U. S. 912. Petitions for rehearing denied.

OCTOBER 5, 2004

Miscellaneous Order

No. 04A265. GREEN *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

OCTOBER 7, 2004

Dismissal Under Rule 46

No. 03–9939. BORDEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 86 Fed. Appx. 475.

Miscellaneous Order

No. 04A269. BECK, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. *v.* PERKINS. Application to vacate the preliminary injunction entered by the United States District Court for the Eastern District of North Carolina on October 1, 2004, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would deny the application to vacate the preliminary injunction.

Certiorari Denied

No. 04–6693 (04A272). PERKINS *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Pitt County, N. C. Application for stay of execution of sentence of death, presented to THE CHIEF

JUSTICE, and by him referred to the Court, denied. Certiorari denied.

OCTOBER 12, 2004

Certiorari Dismissed

No. 04–5656. COLE *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 870 So. 2d 820.

No. 04–5695. COOPER *v.* LOCK, SUPERINTENDENT, CENTRAL MISSOURI CORRECTIONAL CENTER. Sup. Ct. Mo. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–5726. SMITH *v.* GRIMES, JUDGE, COURT OF COMMON PLEAS, 13TH JUDICIAL DISTRICT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 85 Fed. Appx. 874.

No. 04–6249. PATTERSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 95 Fed. Appx. 705.

Miscellaneous Orders

No. 04A285. ALDRICH *v.* JOHNSON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. D–2378. IN RE DISCIPLINE OF LEVINE. Mel Levine, of Phoenix, Ariz., is suspended from the practice of law in this

Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2379. IN RE DISCIPLINE OF NERENBERG. Mark Joel Nerenberg, of Little Neck, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2380. IN RE DISCIPLINE OF JAMPOL. David Robert Jampol, of Hauppauge, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2381. IN RE DISCIPLINE OF HANKIN. Jerard Steven Hankin, of Poughkeepsie, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2382. IN RE DISCIPLINE OF BATTS. Rodney Batts, of New York, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2383. IN RE DISCIPLINE OF HILAIRE. Elmina M. Hilaire, of Westbury, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2384. IN RE DISCIPLINE OF ALLEN. Jessica Allen, of Seldon, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. 04M12. SCOTT *v.* WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 04M13. BOGGS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 03–1559. BANK OF CHINA, NEW YORK BRANCH *v.* NBM L. L. C. ET AL. C. A. 2d Cir.;

No. 04–31. MCFARLING *v.* MONSANTO CO. C. A. Fed. Cir.; and

No. 04–165. COMSTOCK RESOURCES, INC., ET AL. *v.* KENNARD ET AL. C. A. 10th Cir. The Acting Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 04–5703. PARIS *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 10th Cir.; and

No. 04–5794. GOLDSTEIN *v.* HARVARD UNIVERSITY. C. A. 1st Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until November 2, 2004, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 04–6201. IN RE BROWN;

No. 04–6205. IN RE PARKER;

No. 04–6206. IN RE POTTS;

No. 04–6209. IN RE RIDDICK; and

No. 04–6276. IN RE TWITTY. Petitions for writs of habeas corpus denied.

No. 04–5616. IN RE TWILLEY; and

No. 04–5620. IN RE WILLIAMS. Petitions for writs of mandamus denied.

No. 04–226. IN RE ARIZPE;

No. 04–5577. IN RE DEROCK; and

No. 04–6087. IN RE BOAKYE-YIADOM. Petitions for writs of mandamus and/or prohibition denied.

No. 04–5786. IN RE GRISSOM. Petition for writ of prohibition denied.

Certiorari Granted

No. 03–1500. VAN ORDEN *v.* PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVA-

TION BOARD, ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 351 F. 3d 173.

No. 03–1566. ORFF ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 358 F. 3d 1137.

No. 03–1693. MCCREARY COUNTY, KENTUCKY, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 354 F. 3d 438.

No. 03–1696. EXXON MOBIL CORP. ET AL. *v.* SAUDI BASIC INDUSTRIES CORP. C. A. 3d Cir. Certiorari granted. Reported below: 364 F. 3d 102.

No. 03–9877. CUTTER ET AL. *v.* WILKINSON, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 349 F. 3d 257.

No. 04–70. EXXON MOBIL CORP. *v.* ALLAPATTAH SERVICES, INC., ET AL. C. A. 11th Cir.; and

No. 04–79. DEL ROSARIO ORTEGA ET AL. *v.* STAR-KIST FOODS, INC. C. A. 1st Cir. Certiorari in No. 04–70 granted limited to Question 1 presented by the petition. Certiorari in No. 04–79 granted. Cases consolidated, and a total of 90 minutes is allotted for oral argument. Reported below: 04–70, 333 F. 3d 1248; No. 04–79, 370 F. 3d 124.

No. 04–163. LINGLE, GOVERNOR OF HAWAII, ET AL. *v.* CHEVRON U. S. A. INC. C. A. 9th Cir. Certiorari granted. Reported below: 363 F. 3d 846.

Certiorari Denied

No. 03–1520. LEE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 898 So. 2d 790.

No. 03–1579. RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. *v.* VERIZON INTERNET SERVICES, INC.; and

No. 03–1722. VERIZON INTERNET SERVICES, INC. *v.* RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 351 F. 3d 1229.

No. 03–1585. BOXER ET AL. *v.* COX ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 359 F. 3d 1105.

No. 03–1610. WHITAKER ET AL. *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 353 F. 3d 947.

No. 03–9549. COLVIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 353 F. 3d 569.

No. 03–9808. MALLETT *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 7th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 580.

No. 03–10625. STEELE *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 355 F. 3d 1204.

No. 03–10817. HAMBLIN *v.* MITCHELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 354 F. 3d 482.

No. 03–10824. RIBLET *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 128.

No. 03–10945. DIAZ-VALENZUELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 198.

No. 04–12. NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS ET AL. *v.* UNITED STATES TELECOM ASSN. ET AL.;

No. 04–15. AT&T CORP. ET AL. *v.* UNITED STATES TELECOM ASSN. ET AL.; and

No. 04–18. CALIFORNIA ET AL. *v.* UNITED STATES TELECOM ASSN. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 359 F. 3d 554.

No. 04–24. JONES *v.* DELGADO. C. A. 7th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 185.

No. 04–32. MEDRAD, INC. *v.* LIEBEL-FLARSHEIM CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 358 F. 3d 898.

No. 04–33. FLYNT ET AL. *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 355 F. 3d 697.

No. 04–39. GOLLIE *v.* ELKAY MINING CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 52.

No. 04–97. BERENS, AS SUCCESSOR TO STRUYK, TRUSTEE, ET AL. *v.* C. W. M. ET AL.; and
No. 04–152. A. M. P. ET AL. *v.* C. W. M. ET AL. Ct. App. Minn. Certiorari denied. Reported below: 674 N. W. 2d 222.

No. 04–99. RENDEROS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 114 Cal. App. 4th 961, 8 Cal. Rptr. 3d 163.

No. 04–144. NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* ANDERSON. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 154 Ohio App. 3d 393, 797 N. E. 2d 537.

No. 04–148. PABST *v.* CITY OF FLINT, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 29.

No. 04–151. PUBLIC EMPLOYEES RETIREMENT BOARD OF THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION OF NEW MEXICO *v.* GILL. Sup. Ct. N. M. Certiorari denied. Reported below: 135 N. M. 472, 90 P. 3d 491.

No. 04–155. TUCKER ET UX. *v.* METROWEST MEDICAL CENTER ET AL. App. Ct. Mass. Certiorari denied. Reported below: 60 Mass. App. 1108, 800 N. E. 2d 726.

No. 04–161. DJ MANUFACTURING CORP. *v.* TEX-SHIELD, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 347 F. 3d 337.

No. 04–167. GIBSON *v.* MERRILL ET UX. Sup. Ct. Idaho. Certiorari denied. Reported below: 139 Idaho 840, 87 P. 3d 949.

No. 04–170. HAHN *v.* VILLAS OF ST. THERESE ASSISTED LIVING, INC. Sup. Ct. Ohio. Certiorari denied. Reported below: 102 Ohio St. 3d 1421, 807 N. E. 2d 366.

No. 04–172. U. S. BANK NATIONAL ASSN. ET AL. *v.* HSBC BANK USA ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 364 F. 3d 355.

No. 04–185. LAATSCH ET AL. *v.* MIHAILOVICH. C. A. 7th Cir. Certiorari denied. Reported below: 359 F. 3d 892.

No. 04–188. WILLIAMS *v.* RHOADES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 354 F. 3d 1101.

No. 04–194. HALL *v.* PENNSYLVANIA BOARD OF PROBATION AND PAROLE. Sup. Ct. Pa. Certiorari denied. Reported below: 578 Pa. 245, 851 A. 2d 859.

No. 04–195. FRIERSON *v.* GOETZ. C. A. 6th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 649.

No. 04–196. GAUS *v.* CONAIR CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 363 F. 3d 1284.

No. 04–200. MARSHALL, WARDEN *v.* CALIENDO. C. A. 9th Cir. Certiorari denied. Reported below: 365 F. 3d 691.

No. 04–204. WALLACE, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF WALLACE, ET AL. *v.* OHIO DEPARTMENT OF COMMERCE, DIVISION OF STATE FIRE MARSHAL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 04–210. ENYEART *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 676 N. W. 2d 311.

No. 04–220. RHOADS *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 187.

No. 04–224. BEVINGTON *v.* OHIO UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 748.

No. 04–225. PEREZ *v.* NORWEGIAN-AMERICAN HOSPITAL, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 910.

No. 04–240. ROSE *v.* POTTER, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 951.

No. 04–243. COHEN ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 9 App. Div. 3d 71, 773 N. Y. S. 2d 371.

No. 04–248. MCCREARY *v.* HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–257. MOTTL *v.* MISSOURI LAWYER TRUST ACCOUNT FOUNDATION ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 133 S. W. 3d 142.

No. 04–270. LATEEF *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 443.

No. 04–272. PARK *v.* STATE BAR OF CALIFORNIA ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 04–276. PEASLEY *v.* STATE BAR OF ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 208 Ariz. 27, 90 P. 3d 764.

No. 04–290. MILLIGAN ET UX. *v.* EQUITY RESIDENTIAL PROPERTIES MANAGEMENT CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 991.

No. 04–299. KOLKER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 552.

No. 04–309. NASS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 415.

No. 04–344. COTSWALD TRADING CO., LTD. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 362 F. 3d 413.

No. 04–348. GERARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 362 F. 3d 484.

No. 04–365. BOYKIN *v.* MINETA, SECRETARY OF TRANSPORTATION. C. A. 4th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 968.

No. 04–5064. HALL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–5088. TAYLOR *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 134 S. W. 3d 21.

No. 04–5132. HAAS *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 942.

No. 04–5220. DELGADO-MORENO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 646.

No. 04–5543. THOMAS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 117 Wash. App. 1071.

No. 04–5555. WOODS *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5558. BASALO *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5560. THOMAS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 733.

No. 04–5562. DAY *v.* MITCHELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5568. DEAN *v.* SMITH COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 75.

No. 04–5570. AUGE *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 75 Fed. Appx. 867.

No. 04–5575. JOYNER *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 829.

No. 04–5579. CALHOUN, AKA MARTIN *v.* FRISCO RAILROAD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 576.

No. 04–5587. BARNES *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–5590. LASTER *v.* SMALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5596. RUDDICK *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5608. BOWIE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 856.

No. 04–5610. PARKER *v.* MORENO. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 84.

No. 04–5612. JENKINS *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 873 So. 2d 337.

No. 04–5618. UMOREN *v.* HINES, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 04–5621. DAVIS *v.* POWELL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 495.

No. 04–5624. CRENSHAW *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5635. JOHNSON *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 872 So. 2d 914.

No. 04–5636. BAKER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5637. BROWN *v.* WOLSTEIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 71 Fed. Appx. 96.

No. 04–5642. RIVERS *v.* BITZEL ET AL. Sup. Ct. Pa. Certiorari denied.

No. 04–5645. DALY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–5652. MAGANA CARDONA *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 04–5653. COLLINS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–5655. MONGE DELGADO *v.* WORKMAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–5657. COOK *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 04–5660. HUTCHINSON *v.* FARWELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 292.

No. 04–5661. HADLEY *v.* WALKER, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–5664. GRANDOIT *v.* TECHNICAL AID CORP. App. Ct. Mass. Certiorari denied. Reported below: 59 Mass. App. 1105, 796 N. E. 2d 896.

No. 04–5666. GREEN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5673. ROSS *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 898.

No. 04–5674. STAUFFER *v.* WOLFE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION. C. A. 3d Cir. Certiorari denied.

No. 04–5675. TORRES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5676. BRANUM *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5677. APPLIN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5684. ROLLINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5687. GRANT *v.* TRUE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 277.

No. 04–5700. MOORE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–5710. HILSKA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied.

No. 04–5712. ARROYO MARTINEZ *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5713. LONG *v.* KENTUCKY ET AL. Ct. App. Ky. Certiorari denied.

No. 04–5714. PERRY *v.* ALABAMA. Ct. Civ. App. Ala. Certiorari denied. Reported below: 912 So. 2d 1165.

No. 04–5715. PRUITT *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied.

No. 04–5717. JOHNSTON *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 04–5719. FLEMING *v.* GOOD, ACTING SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5728. BURDAN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 04–5729. BEDARD *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 668 N. W. 2d 598.

No. 04–5735. RAMIREZ BARRON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 840.

No. 04–5736. HARSHMAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 815 A. 2d 1126.

No. 04–5741. CONATZER *v.* MEDICAL PROFESSIONAL BUILDING SERVICES CORP. C. A. 10th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 276.

No. 04–5742. CALHOUN-EL *v.* KAVANAGH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 961.

No. 04–5743. ROTH *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 85 P. 3d 571.

No. 04–5744. RUCKER *v.* SANTA CLARA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–5747. JOHNSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 356 Ark. 534, 157 S. W. 3d 151.

No. 04–5748. JACOBS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 162 N. C. App. 722, 592 S. E. 2d 294.

No. 04–5749. LEWIS *v.* EARLY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5750. HOWELL *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5753. COCHRAN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 275.

No. 04–5755. COLEMAN *v.* NASSAU COUNTY, NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 2 App. Div. 3d 562, 768 N. Y. S. 2d 371.

No. 04–5756. DUNCAN *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–5757. PEACOCK *v.* SMITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 413.

No. 04–5758. BRADLEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 4 App. Div. 3d 155, 772 N. Y. S. 2d 41.

No. 04–5760. PREE *v.* KAPTURE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–5764. FLEEKS *v.* POPPELL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 251.

No. 04–5768. CARPINO *v.* NOVA CARE PROSTHETICS, INC., ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 120 Nev. 1226, 131 P. 3d 588.

No. 04–5772. PHILLIPS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5774. COATES *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–5775. CHRISTIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 356 F. 3d 1103.

No. 04–5776. WELCH *v.* BEAUCLAIR ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–5777. TIMMONS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5778. SCOTT *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5779. HUDSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 277 Ga. 581, 591 S. E. 2d 807.

No. 04–5781. FRAZIER *v.* BRIGANO, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 102 Ohio St. 3d 148, 807 N. E. 2d 346.

No. 04–5784. HOAG *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–5785. GUTIERREZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5788. HYMES *v.* MCILWAIN ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 866 So. 2d 473.

No. 04–5791. HOBBS, AKA BROWN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 04–5793. GUOAN *v.* LAVIGNE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–5799. STARK *v.* SUPREME COURT OF KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 04–5801. PUSKAC *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 725.

No. 04–5804. IBRAHIM *v.* IBRAHIM. Sup. Ct. N. J. Certiorari denied.

No. 04–5805. BROOKS *v.* SOCIAL SECURITY ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 97 Fed. Appx. 301.

No. 04–5806. TAALIB-DIN *v.* CITY OF DETROIT, MICHIGAN, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 89 Fed. Appx. 281.

No. 04–5807. HAMPTON *v.* MARION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 410.

No. 04–5809. ETORIA *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–5810. DEBOSE *v.* LAIN. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 97.

No. 04–5818. GRAZIANO *v.* CUNNINGHAM, SUPERINTENDENT, WOODBOURNE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 78 Fed. Appx. 162.

No. 04–5823. GOTT *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 609.

No. 04–5847. JONES *v.* SHANNON VILLAS CONDOMINIUM ASSN. Ct. App. Ga. Certiorari denied.

No. 04–5848. LYLE *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5853. KING *v.* HUNTER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5855. GRATTON *v.* CEPAK, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 391.

No. 04–5870. SHEEHAN *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 04–5871. WILSON *v.* BRILEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–5886. CVIJETINOVIC *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 04–5892. ROACHE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 308 App. Div. 2d 388, 764 N. Y. S. 2d 622.

No. 04–5894. VAUGHAN *v.* SOUTHERN AIR ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 879 So. 2d 625.

No. 04–5895. PEOPLES *v.* SMITH, SUPERINTENDENT, EASTERN CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 771.

No. 04–5929. PERKINS *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 914.

No. 04–5953. BLACKWELL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 357 Ark. xvi.

No. 04–5955. ROTH *v.* HOFFER. Sup. Ct. N. D. Certiorari denied. Reported below: 688 N. W. 2d 402.

No. 04–5956. RODRIGUEZ *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 278 Kan. ——, 91 P. 3d 1238.

No. 04–5963. ASH *v.* ASH, CONSERVATOR/GUARDIAN OF ASH, DECEASED. Ct. App. Ore. Certiorari denied.

No. 04–5965. DENNIS *v.* OHIO. Ct. App. Ohio, Trumbull County. Certiorari denied.

No. 04–5969. MCGOWAN *v.* GREER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–5970. LOVELACE *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 140 Idaho 73, 90 P. 3d 298.

No. 04–5986. STALLONE *v.* GIRDICH, SUPERINTENDENT, UPSTATE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–6016. DAVIS *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–6017. MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 993.

No. 04–6022. GODWIN *v.* PEGUESE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 871.

No. 04–6026. WRIGHT *v.* WEST, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–6032. JACKSON *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 344 Ill. App. 3d 1233, 859 N. E. 2d 325.

No. 04–6036. BARRETT *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 862 So. 2d 44.

No. 04–6044. RISDAL *v.* VILSACK, GOVERNOR OF IOWA, ET AL. Sup. Ct. Iowa. Certiorari denied.

No. 04–6059. SPURLOCK *v.* ARMY CORPS OF ENGINEERS. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 916.

No. 04–6060. EVANS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–6071. LA COCK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 366 F. 3d 883.

No. 04–6072. MCKINNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 245.

No. 04–6077. FREE, AKA COIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–6079. UNDERWOOD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 364 F. 3d 956.

No. 04–6097. WARD *v.* BARRON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 41.

No. 04–6100. CANTILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 369 F. 3d 1229.

No. 04–6101. BLACK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 369 F. 3d 1171.

No. 04–6103. DICKERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 370 F. 3d 1330.

No. 04–6105. CROSS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 278 Kan. ——, 91 P. 3d 1238.

No. 04–6107. MCLEAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 892.

No. 04–6109. MYERS *v.* WILSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 04–6111. PEREZ-OLIVO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

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No. 04–6112. RANDOLPH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 364 F. 3d 118.

No. 04–6115. LERMA-ANGULO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 893.

No. 04–6123. BRISBANE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 367 F. 3d 910.

No. 04–6124. CHAVEZ-REYES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 36.

No. 04–6126. KOKOSKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 54.

No. 04–6128. GARCIA-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 648.

No. 04–6142. HAMMONDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6144. HARWOOD *v.* FLEMING, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 546.

No. 04–6147. MCDOWELL *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 272 Wis. 2d 488, 681 N. W. 2d 500.

No. 04–6156. ELDRIDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 36.

No. 04–6159. DANIEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6165. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 389.

No. 04–6167. MEANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6171. WHITE *v.* HAINES, WARDEN. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 215 W. Va. 698, 601 S. E. 2d 18.

No. 04–6173. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 221.

No. 04–6179. WAGNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 593.

No. 04–6180. EBRON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 838 A. 2d 1140.

No. 04–6192. RICHARDS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–6202. AVILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 963.

No. 04–6217. ADKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 159.

No. 04–6223. NAGHANI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 361 F. 3d 1255.

No. 04–6230. TOWERS *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 98 Fed. Appx. 169.

No. 04–6235. RETTA-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 879.

No. 04–6238. FLORES MOLINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 689.

No. 04–6247. BURNS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 82.

No. 04–6278. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 03–779. ANDRX PHARMACEUTICALS, INC. *v.* KROGER CO. ET AL. C. A. 6th Cir. Motions of New York Intellectual Property Law Association, Pharmaceutical Research and Manufacturers of America, Washington Legal Foundation, American Intellectual Property Law Association, and Center for the Advancement of Capitalism for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 332 F. 3d 896.

No. 03–1175. VALLEY DRUG CO. ET AL. *v.* GENEVA PHARMACEUTICALS, INC.; and

No. 03–1178. WALGREEN CO. ET AL. *v.* ABBOTT LABORATORIES ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR

took no part in the consideration or decision of these petitions. Reported below: 344 F. 3d 1294.

No. 03–1457. METROPOLITAN STEVEDORE CO. *v.* CRESCENT WHARF & WAREHOUSE CO. ET AL. C. A. 9th Cir. Motion of National Association of Waterfront Employers et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 339 F. 3d 1102.

No. 04–6. DENNY'S, INC., IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR, ET AL. *v.* CAKE, ACTING DIRECTOR, CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, ET AL. C. A. 4th Cir. Motions of National Council of Chain Restaurants, National Restaurant Association, and Chamber of Commerce of the United States of America for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 364 F. 3d 521.

No. 04–47. UNION PACIFIC RAILROAD CO. *v.* BARBER ET AL. Sup. Ct. Ark. Motion of American Tort Reform Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 356 Ark. 268, 149 S. W. 3d 325.

No. 04–215. ROBART *v.* ALASKA. Ct. App. Alaska. Motion of American Mint LLC for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 82 P. 3d 787.

No. 04–6286. KING ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 03–1115. MALLOY *v.* TELEPHONICS CORP., 541 U. S. 974; and

No. 03–1476. MCGREGOR *v.* MINETA, SECRETARY OF TRANSPORTATION, 542 U. S. 905. Petitions for rehearing denied.

No. 03–6446. LINDSEY *v.* BENJAMIN ET AL., 540 U. S. 1052; and

No. 03–9756. FLOYD *v.* UNITED STATES, 541 U. S. 1054. Motions of petitioners for leave to file petitions for rehearing denied.

No. 03–9309. BREEN *v.* UNITED STATES, 541 U. S. 999 and 1096. Motion of petitioner for leave to file second petition for rehearing denied.

OCTOBER 14, 2004

Dismissal Under Rule 46

No. 04–260. GEN-PROBE INC. *v.* VYSIS, INC. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 359 F. 3d 1376.

OCTOBER 18, 2004

Vacated and Remanded on Appeal

No. 03–1391. JACKSON ET AL. *v.* PERRY, GOVERNOR OF TEXAS, ET AL.;

No. 03–1396. AMERICAN GI FORUM OF TEXAS ET AL. *v.* PERRY, GOVERNOR OF TEXAS, ET AL.;

No. 03–1399. LEE ET AL. *v.* PERRY, GOVERNOR OF TEXAS, ET AL.;

No. 03–1400. TRAVIS COUNTY, TEXAS *v.* PERRY, GOVERNOR OF TEXAS, ET AL.; and

No. 03–9644. HENDERSON *v.* PERRY, GOVERNOR OF TEXAS, ET AL. Appeals from D. C. E. D. Tex. Motion of appellant in No. 03–9644 for leave to proceed *in forma pauperis* granted. Judgment vacated, and cases remanded for further consideration in light of *Vieth* v. *Jubelirer*, 541 U. S. 267 (2004). Reported below: 298 F. Supp. 2d 451.

Miscellaneous Orders

No. 04M14. DYSON *v.* CALIFORNIA ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 03–9629. RIVERS *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner to consolidate this case with No. 03–9685, *Johnson* v. *United States* [certiorari granted, 542 U. S. 965], denied.

No. 04–5897. FITZGERALD *v.* FITZGERALD ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept.; and

No. 04–5908. SCOTT *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE. C. A. 3d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until November 8, 2004, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 04–6428. IN RE EDELMANN;
No. 04–6456. IN RE PAYNE;
No. 04–6462. IN RE VIVERO; and
No. 04–6491. IN RE CAIN ET AL. Petitions for writs of habeas corpus denied.

No. 04–5903. IN RE EDMOND. Petition for writ of mandamus denied.

No. 04–6116. IN RE BELLON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 04–5293. DECK *v.* MISSOURI. Sup. Ct. Mo. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 136 S. W. 3d 481.

Certiorari Denied

No. 03–1635. SHAFFER *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 89 Fed. Appx. 265.

No. 03–10414. COCKRELL *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 34.

No. 03–10539. TROCHES *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 736.

No. 03–10546. DOBYNES *v.* HUBBARD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 188.

No. 03–10695. SMALLS *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 87 Fed. Appx. 167.

No. 04–51. HOWARD ET AL. *v.* SOUTHERN ILLINOIS RIVERBOAT/CASINO CRUISES, INC., DBA PLAYERS ISLAND CASINO, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 364 F. 3d 854.

No. 04–69. BERNARDO ET AL. *v.* PLANNED PARENTHOOD FEDERATION OF AMERICA ET AL. Ct. App. Cal., 4th App. Dist.,

Div. 1. Certiorari denied. Reported below: 115 Cal. App. 4th 322, 9 Cal. Rptr. 3d 197.

No. 04–74. SOUTH DAKOTA *v.* CUMMINGS. Sup. Ct. S. D. Certiorari denied. Reported below: 679 N. W. 2d 484.

No. 04–83. TUCKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–202. KHASHAN *v.* WFS FINANCIAL SERVICES, INC. C. A. 9th Cir. Certiorari denied.

No. 04–205. AKAN-ETUK *v.* SANTA CLARA COUNTY, CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 04–207. LEWIS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 101 Ohio St. 3d 170, 803 N. E. 2d 777.

No. 04–211. JOHNSON *v.* U. S. BANK N. A., FKA FIRST BANK N. A., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 387.

No. 04–214. GREENBLATT *v.* ORENBERG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 102 Fed. Appx. 768.

No. 04–216. MCDONALD *v.* MCDONALD. Sup. Ct. Miss. Certiorari denied. Reported below: 876 So. 2d 296.

No. 04–217. OSBURN ET AL. *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 369 F. 3d 1283.

No. 04–234. MAYS, TRUSTEE, ET AL. *v.* ST. PAT PROPERTIES, LLC, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 357 Ark. 482, 182 S. W. 3d 84.

No. 04–238. WALKER *v.* WAINWRIGHT. C. A. 11th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 152.

No. 04–241. RANGEL-QUINONEZ ET AL. *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 114.

No. 04–269. STOKOVICH *v.* VILLAGE OF LAKE VILLA, ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 211 Ill. 2d 106, 810 N. E. 2d 13.

No. 04–302. PANG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 362 F. 3d 1187.

No. 04–303. PHILLIPS *v.* VILLAGE OF OAK PARK, ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 336 Ill. App. 3d 1042, 841 N. E. 2d 540.

No. 04–321. TAMAI *v.* STEVENS. C. A. Fed. Cir. Certiorari denied. Reported below: 366 F. 3d 1325.

No. 04–362. ANKERMAN *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 81 Conn. App. 503, 840 A. 2d 1182.

No. 04–5474. HANKINS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 132 S. W. 3d 380.

No. 04–5722. REESE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 503.

No. 04–5796. PRIMEAUX *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 88 P. 3d 893.

No. 04–5813. GIBSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5814. HANSON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 04–5815. BRONSON *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Pa. Certiorari denied. Reported below: 577 Pa. 653, 848 A. 2d 917.

No. 04–5819. GAUTHIER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 04–5820. HART *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–5829. MORROW *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 505.

No. 04–5835. HOLLOWAY *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 656.

No. 04–5836. MAYJACK *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–5838. VAUGHAN *v.* VAUGHAN ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 838 So. 2d 657.

No. 04–5839. PEARSON *v.* SAAR, SECRETARY, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 482.

No. 04–5842. PENDLEY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5846. HARRIS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–5854. LYONS *v.* FLOYD, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 877.

No. 04–5856. ANDREOZZI *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 04–5859. PARKER *v.* MEYERS. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 967.

No. 04–5860. ACKLES *v.* BULLARD, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–5866. SPUCK *v.* DESUTA, SUPERINTENDENT, STATE REGIONAL CORRECTIONAL FACILITY AT MERCER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5868. BUTTI *v.* GIAMBRUNO, SUPERINTENDENT, WYOMING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–5872. THOMPSON *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–5885. STEWART *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 777.

No. 04–5889. JACKSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–5893. VAUGHAN *v.* PUTNAM COUNTY, FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 881 So. 2d 1115.

No. 04–5898. FELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 360 F. 3d 135.

No. 04–5901. MILLER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–5905. COTTON *v.* AGNES SLACK LP OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 04–5907. DAVIS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 616.

No. 04–5910. SMITH *v.* NEW MEXICO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 780.

No. 04–5912. JONES *v.* CITY OF ST. LOUIS, MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 132 S. W. 3d 896.

No. 04–5916. PAVLICHKO *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5921. CIEMPA *v.* WORKMAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 04–5922. MONROE *v.* MOSLEY, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 875.

No. 04–5924. VIZCAINO *v.* ESCALON PREMIER BRANDS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 332.

No. 04–5934. CASTILLO *v.* JAMBON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 931.

No. 04–5937. CRAWFORD *v.* TURPIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 921.

No. 04–5938. FAGAN *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 96 Fed. Appx. 785.

No. 04–5939. CRAMER *v.* ENGLERT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 93 Fed. Appx. 263.

No. 04–5948. KELLY *v.* NORTEL NETWORKS CORP. C. A. 1st Cir. Certiorari denied. Reported below: 86 Fed. Appx. 439.

No. 04–5951. NEWMAN *v.* ROWLEY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 04–5999. LITTLEJOHN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 85 P. 3d 287.

No. 04–6019. GADDIE *v.* COTTON, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 04–6020. HARRIS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 470 Mich. 56, 679 N. W. 2d 41.

No. 04–6021. GRAY *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 756.

No. 04–6061. COLLINS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 04–6067. NEWTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 369 F. 3d 659.

No. 04–6068. CARTER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 344 Ill. App. 3d 1210, 859 N. E. 2d 315.

No. 04–6069. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 344 Ill. App. 3d 1214, 859 N. E. 2d 316.

No. 04–6081. POTTER *v.* CASTRO, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–6085. BROWN *v.* PENNSYLVANIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6122. CLEM ET AL. *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 119 Nev. 615, 81 P. 3d 521.

No. 04–6131. JONES *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6132. NOEM VETA *v.* DUPNIK. C. A. 9th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 805.

No. 04–6143. GRETHEN *v.* CIRCUIT COURT OF VIRGINIA, CITY OF SUFFOLK. Sup. Ct. Va. Certiorari denied.

No. 04–6164. ALVAREZ CASTILLO *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 131.

No. 04–6229. WISE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 359 S. C. 14, 596 S. E. 2d 475.

No. 04–6243. GARDNER *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 875.

No. 04–6245. PARRIMON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 892.

No. 04–6252. JARVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–6256. DOOLIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–6258. PRINCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 210.

No. 04–6263. GIVEN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 441 Mass. 741, 808 N. E. 2d 788.

No. 04–6265. HARDIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 525.

No. 04–6282. MCCOY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 859 A. 2d 652.

No. 04–6284. TOURON *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 102 Fed. Appx. 671.

No. 04–6285. LINN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 362 F. 3d 1261.

No. 04–6298. RHODES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 477.

No. 04–6310. DODD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 739.

No. 04–6315. BRYANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 138.

No. 04–6317. WRIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 742.

No. 04–6319. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 162.

No. 04–6320. WELDON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 845 A. 2d 550.

No. 04–6327. BOCANEGRA-GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 565.

No. 04–6328. BARAJAS-ARCILIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 549.

No. 04–6329. BENNETT *v.* WEST VIRGINIA. Cir. Ct. Mercer County, W. Va. Certiorari denied.

No. 04–6330. ANSALDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 372 F. 3d 118.

No. 04–6331. LEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 665.

No. 04–6335. ROANE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 901.

No. 04–6339. MOORE *v.* OLSON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 368 F. 3d 757.

No. 04–6342. DUNN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 600.

No. 04–6343. CORREA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–6344. DURAN-ROMERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 753.

No. 04–6350. BATTLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 04–6351. ORTIZ-BAEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–6354. CHAVEZ-ARRIAGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 564.

No. 04–6356. RAYMOND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–6361. ALVAREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 276.

No. 04–6364. ASHTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 643.

No. 04–6370. CAZARES-ALVARADO *v.* UNITED STATES; TABAREZ-RAMIREZ, AKA RODRIGUEZ *v.* UNITED STATES; ZARCO FLORES *v.* UNITED STATES; CONTRERAS *v.* UNITED STATES; VIDAL *v.* UNITED STATES; GARZA *v.* UNITED STATES; DIAZ *v.* UNITED STATES; MANCILLA REAL *v.* UNITED STATES; and DAMON COURVILLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 468 (second judgment), 552 (fifth judgment), and 971 (first judgment); 102 Fed. Appx. 400 (third judgment); 106 Fed. Appx. 918 (sixth judgment); 108 Fed. Appx. 875 (eighth judgment), 876 (ninth judgment), and 877 (fourth judgment).

No. 04–6372. BERMEA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 510.

No. 04–6373. BENNETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 F. 3d 947.

No. 04–6377. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 380 F. 3d 183.

No. 04–6381. DRABOVSKIY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–6386. KEITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 375 F. 3d 346.

No. 04–6393. LAFLAM, AKA CHARBONNEAU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 369 F. 3d 153.

No. 04–6408. ERNESTO ARMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10623. AYERS *v.* THOMPSON, UNITED STATES CONGRESSMAN, ET AL. C. A. 5th Cir. Motion of petitioner for leave to file an amended petition for writ of certiorari granted. Motions of Ivory Phillips, Chairman of Mississippi Coalition for Higher Education, et al., and Alcorn State University National Alumni et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 358 F. 3d 356.

OCTOBER 20, 2004

Dismissal Under Rule 46

No. 04–6189. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 102 Fed. Appx. 47.

Miscellaneous Order

No. 04A283 (04–5129). MORROW *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER would grant the application for stay of execution.

OCTOBER 23, 2004

Miscellaneous Order

No. 04A320. NADER ET AL. *v.* SERODY ET AL. Application to stay enforcement of judgment of the Pennsylvania Supreme Court pending filing and disposition of petition for writ of certiorari, presented to JUSTICE SOUTER, and by him referred to the Court, denied. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

OCTOBER 26, 2004

Miscellaneous Orders

No. 04A321. BLANKENSHIP ET AL. *v.* BLACKWELL, SECRETARY OF STATE OF OHIO, ET AL. C. A. 6th Cir. Application for injunc-

tion pending appeal, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. 04A336. GREEN *v.* HARRIS COUNTY DISTRICT ATTORNEY'S OFFICE ET AL. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

Rehearing Denied

No. 03–9823 (04A317). GREEN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 823. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for rehearing denied.

OCTOBER 27, 2004

Miscellaneous Order

No. 04A284. PHILIP MORRIS USA INC. *v.* HENLEY. Ct. App. Cal., 1st App. Dist. Application for stay of remittitur, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

NOVEMBER 1, 2004

Certiorari Dismissed

No. 04–5574. JORDAN *v.* OHIO. Sup. Ct. Ohio. Certiorari dismissed as moot. Reported below: 101 Ohio St. 3d 216, 804 N. E. 2d 1.

Miscellaneous Orders

No. 04A208. SEARLES *v.* BOARD OF EDUCATION OF CHICAGO ET AL. C. A. 7th Cir. Application for injunctive relief, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 04A229. ANKERMAN *v.* CONNECTICUT. App. Ct. Conn. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 04A252 (04–385). STERN *v.* UNITED STATES. C. A. 1st Cir. Application for bail, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. 04A255. GRAVES *v.* SCHROEDER, JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, ET AL. C. A. 9th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 04M15. JOYNER *v.* NEWS JOURNAL ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 128, Orig. ALASKA *v.* UNITED STATES. Motion of Alaska for leave to file a surreply denied. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 541 U. S. 1061.]

No. 02–1672. JACKSON *v.* BIRMINGHAM BOARD OF EDUCATION. C. A. 11th Cir. [Certiorari granted, 542 U. S. 903.] Motion of Alabama et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted. The time is divided as follows: 20 minutes to respondent and 10 minutes to Alabama et al. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–710. DEVENPECK ET AL. *v.* ALFORD. C. A. 9th Cir. [Certiorari granted, 541 U. S. 987.] Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 03–855. CITY OF SHERRILL, NEW YORK *v.* ONEIDA INDIAN NATION OF NEW YORK ET AL. C. A. 2d Cir. [Certiorari granted, 542 U. S. 936.] Motion of New York for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–923. ILLINOIS *v.* CABALLES. Sup. Ct. Ill. [Certiorari granted, 541 U. S. 972.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 03–1116. GRANHOLM, GOVERNOR OF MICHIGAN, ET AL. *v.* HEALD ET AL. C. A. 6th Cir.;

No. 03–1120. MICHIGAN BEER & WINE WHOLESALERS ASSN. *v.* HEALD ET AL. C. A. 6th Cir.; and

No. 03–1274. SWEDENBURG ET AL. *v.* KELLY, CHAIRMAN, NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL, STATE LIQUOR AUTHORITY, ET AL. C. A. 2d Cir. [Certiorari granted, 541 U. S. 1062.] Motion to reorder presentation of oral argument and for divided argument granted.

No. 03–1423. MUEHLER ET AL. *v.* MENA. C. A. 9th Cir. [Certiorari granted, 542 U. S. 903.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–293. HONEYWELL INTERNATIONAL INC. ET AL. *v.* HAMILTON SUNDSTRAND CORP. C. A. Fed. Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 04–5990. WAYNE *v.* SANTA CLARA VALLEY TRANSPORTATION AUTHORITY. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 22, 2004, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 04–6568. IN RE CAMPBELL;

No. 04–6591. IN RE HAWKINS;

No. 04–6599. IN RE PRETEL GOMEZ;

No. 04–6640. IN RE SHORTER;

No. 04–6674. IN RE DURAN ESPINOZA;

No. 04–6721. IN RE GREEN; and

No. 04–6745. IN RE WEINSTEIN. Petitions for writs of habeas corpus denied.

No. 04–6639. IN RE ROLLER. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 04–6027. IN RE YOUNG;

No. 04–6073. IN RE NORMAN; and

No. 04–6152. IN RE WALTERS. Petitions for writs of mandamus denied.

Certiorari Granted

No. 04–278. TOWN OF CASTLE ROCK, COLORADO *v.* GONZALES, INDIVIDUALLY AND AS NEXT BEST FRIEND OF HER DECEASED MINOR CHILDREN, GONZALES ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 366 F. 3d 1093.

Certiorari Denied

No. 03–1475. RICE *v.* MCCANN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 339 F. 3d 546.

No. 03–1672. CONNECTICUT DEPARTMENT OF SOCIAL SERVICES *v.* OSSEN, TRUSTEE. C. A. 2d Cir. Certiorari denied. Reported below: 361 F. 3d 760.

No. 03–1691. LEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 359 F. 3d 194.

No. 03–1699. FRED SETTOON, INC. *v.* GROS. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 865 So. 2d 143.

No. 03–10604. PIMENTEL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 346 F. 3d 285.

No. 03–10726. LINARES *v.* ELLIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10776. SINGLETARY *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 89 Fed. Appx. 790.

No. 03–11038. RIGSBY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 103.

No. 03–11063. GOULD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 364 F. 3d 578.

No. 04–40. INVENTION SUBMISSION CORP. *v.* DUDAS, AS UNDERSECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE, DEPARTMENT OF COMMERCE. C. A. 4th Cir. Certiorari denied. Reported below: 357 F. 3d 452.

No. 04–60. MARTINGALE, LLC *v.* CITY OF LOUISVILLE, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 361 F. 3d 297.

No. 04–98. SNAKE RIVER VALLEY ELECTRIC ASSN. *v.* PACIFICORP ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 357 F. 3d 1042.

No. 04–103. STUMBO, ATTORNEY GENERAL OF KENTUCKY, ET AL. *v.* ANDERSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 356 F. 3d 651.

No. 04–112. TATE *v.* KOPEC. C. A. 3d Cir. Certiorari denied. Reported below: 361 F. 3d 772.

No. 04–131. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* CALIFORNIA PUBLIC UTILITIES COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 350 F. 3d 932.

No. 04–146. AEROFLOT RUSSIAN AIRLINES *v.* MGM PRODUCTIONS GROUP, INC. C. A. 2d Cir. Certiorari denied. Reported below: 91 Fed. Appx. 716.

No. 04–149. BAKER ET AL. *v.* IBP, INC. C. A. 7th Cir. Certiorari denied. Reported below: 357 F. 3d 685.

No. 04–177. MCKEE ET AL. *v.* CITY OF CASSELBERRY, FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 873 So. 2d 373.

No. 04–209. HOWARD *v.* COLUMBIA PUBLIC SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 363 F. 3d 797.

No. 04–219. SHUMSKY *v.* CHEIN. C. A. 9th Cir. Certiorari denied. Reported below: 373 F. 3d 978.

No. 04–227. SELLENS *v.* AMERICAN STATES INSURANCE CO. Ct. App. Kan. Certiorari denied. Reported below: 32 Kan. App. 2d xxx, 85 P. 3d 228.

No. 04–228. FIRST NATIONAL BANK OF MILACA *v.* BENJAMIN ET AL.; and

No. 04–229. MILLE LACS COUNTY, MINNESOTA *v.* BENJAMIN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 361 F. 3d 460.

No. 04–230. LATINO *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 04–236. ENWONWU *v.* TRANS UNION, LLC, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–239. SCRINGER *v.* GREEN POINT BANK. C. A. 2d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 796.

No. 04–247. LANHAM FORD, INC. *v.* FORD MOTOR CO. C. A. 4th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 381.

No. 04–252. MACY'S EAST, INC. *v.* COMMISSIONER OF REVENUE OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 441 Mass. 797, 808 N. E. 2d 1244.

No. 04–254. MILLS *v.* LAW OFFICE OF MELBOURNE MILLS, JR., ET AL. Ct. App. Ky. Certiorari denied.

No. 04–255. PEREZ ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 266 Ga. App. 82, 596 S. E. 2d 191.

No. 04–261. ROMERO-MORALES *v.* COLORADO. Dist. Ct. Colo., Denver County. Certiorari denied.

No. 04–263. NEXTEL WEST CORP. *v.* P. J.'S CONCRETE PUMPING SERVICE, INC. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 345 Ill. App. 3d 992, 803 N. E. 2d 1020.

No. 04–265. ALTAMIMI *v.* BRABENDER ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 839 A. 2d 1133.

No. 04–267. HALL *v.* UNITED PARCEL SERVICE, INC. C. A. 10th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 764.

No. 04–268. GLAVEY *v.* DIME SAVINGS BANK OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 2 N. Y. 3d 702, 810 N. E. 2d 913.

No. 04–271. BEAUMONT *v.* CASTATOR, AS EXECUTOR AND AS POTENTIAL HEIR OF THE ESTATE OF MEADOWS, ET AL. Ct. Civ. App. Okla. Certiorari denied.

No. 04–275. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES *v.* DOBRIN. Sup. Ct. Fla. Certiorari denied. Reported below: 874 So. 2d 1171.

No. 04–282. CONNECTICUT *v.* SPENCER. Sup. Ct. Conn. Certiorari denied. Reported below: 268 Conn. 575, 848 A. 2d 1183.

No. 04–284. WAGNER *v.* FIRST UNUM LIFE INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 100 Fed. Appx. 862.

No. 04–285. SEIBEL ET UX. *v.* JLG INDUSTRIES, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 362 F. 3d 480.

No. 04–286. NELSON *v.* MITCHELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–289. LUGO RODRIGUEZ ET AL. *v.* PUERTO RICO INSTITUTE OF CULTURE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 98 Fed. Appx. 15.

No. 04–291. BATOR *v.* FREUND ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 930.

No. 04–292. ICE EMBASSY, INC., ET AL. *v.* CITY OF HOUSTON, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 352 F. 3d 162.

No. 04–298. WILLIAMS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 120 Nev. 473, 93 P. 3d 1258.

No. 04–304. HANNIGAN *v.* GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 6.

No. 04–305. PRE-PAID LEGAL SERVICES, INC., ET AL. *v.* BATTLE ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 873 So. 2d 79.

No. 04–307. WAUQUIN VELA ET AL. *v.* CASTELLANO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 786.

No. 04–310. SIRLEAF *v.* ALLSTATE MOVING AND STORAGE. Ct. Sp. App. Md. Certiorari denied.

No. 04–317. VOZNICK *v.* SHURFLO, INC. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 04–319. LALJI *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 665.

No. 04–324. BROWN *v.* SNOW, SECRETARY OF THE TREASURY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 369.

No. 04–336. CRETU *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 991.

No. 04–341. ZOELLICK *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 272 Wis. 2d 857, 679 N. W. 2d 927.

No. 04–352. GIUTTARI *v.* AMERICAN HOME PRODUCTS CORP. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–353. KELLY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–363. CRUZ-VARGAS ET AL. *v.* R. J. REYNOLDS TOBACCO CO. C. A. 1st Cir. Certiorari denied. Reported below: 348 F. 3d 271.

No. 04–369. RENDALL ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 271.

No. 04–370. MURRAY HILL PUBLICATIONS, INC. *v.* TWENTIETH CENTURY FOX FILM CORP. C. A. 6th Cir. Certiorari denied. Reported below: 361 F. 3d 312.

No. 04–371. JAMES *v.* BOOZ-ALLEN & HAMILTON, INC. C. A. 4th Cir. Certiorari denied. Reported below: 368 F. 3d 371.

No. 04–372. CORRIGAN *v.* DOLLAR. C. A. Fed. Cir. Certiorari denied. Reported below: 89 Fed. Appx. 238.

No. 04–380. KEVORKIAN *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–387. MORRISON *v.* CSX TRANSPORTATION, INC. Cir. Ct. Ohio County, W. Va. Certiorari denied.

No. 04–391. SARDANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 101 Fed. Appx. 851.

No. 04–393. ASCHEIM *v.* JUG ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–400. GATES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 372 F. 3d 118.

No. 04–411. ARMSTRONG *v.* BOULDEN, BANKRUPTCY JUDGE, UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH, ET AL.; ARMSTRONG *v.* CORNISH, CHIEF BANKRUPTCY JUDGE, UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF OKLAHOMA, ET AL.; and ARMSTRONG *v.* CORNISH, CHIEF BANKRUPTCY JUDGE, UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 287 (third judgment); 101 Fed. Appx. 773 (first judgment); 102 Fed. Appx. 118 (second judgment).

No. 04–435. MURRELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 368 F. 3d 1283.

No. 04–437. WYETH *v.* SMART ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 369 F. 3d 293.

No. 04–5029. WATKINS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 577 Pa. 194, 843 A. 2d 1203.

No. 04–5046. HEARN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–5072. VANDELFT *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 118 Wash. App. 1071.

No. 04–5109. SHAW *v.* BENNETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 76.

No. 04–5129. MORROW *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 367 F. 3d 309.

No. 04–5247. HARVEY *v.* NEVADA. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 133.

No. 04–5392. SIMMONS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 869 So. 2d 995.

No. 04–5429. QUINCE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 360 F. 3d 1259.

No. 04–5617. BELL *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–5852. DANKS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 32 Cal. 4th 269, 82 P. 3d 1249.

No. 04–5884. ALLEN *v.* PHILLIPS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–5942. WATSON *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 177.

No. 04–5944. WILLIAMSON *v.* GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 04–5958. HOTCHKISS *v.* CLAY TOWNSHIP. Ct. App. Mich. Certiorari denied.

No. 04–5961. WILLIAMS *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 562.

No. 04–5972. JACKSON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 504.

No. 04–5974. JAMES *v.* TENNIS. C. A. 9th Cir. Certiorari denied.

No. 04–5975. AUSTIN *v.* SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 04–5977. MUWAKKIL *v.* VIRGINIA ET AL. (two judgments). Sup. Ct. Va. Certiorari denied.

No. 04–5979. MURRAY *v.* TOWN OF MANSURA, LOUISIANA, ET AL. Sup. Ct. La. Certiorari denied. Reported below: 871 So. 2d 335.

No. 04–5980. EDWARDS *v.* STRINGER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 663.

No. 04–5982. JONES *v.* WALKER, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 04–5984. REID *v.* GOOD, ACTING SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5995. BOOSE *v.* JOHNSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PINE GROVE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5998. MOLINA LOPEZ *v.* ARIZONA. Super. Ct. Ariz., County of Pima. Certiorari denied.

No. 04–6004. NOLEN *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW. C. A. 3d Cir. Certiorari denied. Reported below: 98 Fed. Appx. 97.

No. 04–6005. MEJIA *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6007. EDWARDS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–6008. STRONG *v.* ILLINOIS VOCATIONAL REHABILITATION PROGRAM. C. A. 7th Cir. Certiorari denied.

No. 04–6009. BROWN *v.* DORMIRE, SUPERINTENDENT, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied.

No. 04–6013. BLANCO *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6029. PITTMAN *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 680 N. W. 2d 378.

No. 04–6035. GRIFFIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 866 So. 2d 1.

No. 04–6037. DORROUGH *v.* CAMBRA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 28.

No. 04–6038. ELLIBEE *v.* SIMMONS ET AL. Ct. App. Kan. Certiorari denied. Reported below: 32 Kan. App. 2d 519, 85 P. 3d 216.

No. 04–6043. MARSHALL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 265 Ga. App. 556, 594 S. E. 2d 661.

No. 04–6045. SCHROEDER *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 04–6047. NICKLES *v.* O'MALLEY. C. A. 4th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 421.

No. 04–6049. TIMMONS *v.* MANATT, PHELPS & PHILLIPS, LLP, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–6054. MASI *v.* MCCRAY, SUPERINTENDENT, GOWANDA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–6055. MANNING *v.* HAMLET, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6063. TUCKER *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–6064. WHEELER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6065. VAUGHN *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6070. FISHER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6074. MCGHEE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 04–6080. MITCHELL *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 128 S. W. 3d 518.

No. 04–6082. FERRI *v.* PAPPERT, ATTORNEY GENERAL OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 04–6083. BROWN *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 04–6084. JACKSON *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6086. NELSON *v.* HOWERTON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 371 F. 3d 768.

No. 04–6089. ANDERSON *v.* HATCHER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 658.

No. 04–6091. MOODY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 888 So. 2d 532.

No. 04–6092. MILLER *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 04–6098. MACON *v.* HARTFORD POLICE DEPARTMENT. C. A. 2d Cir. Certiorari denied.

No. 04–6099. ARROYO *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6106. ELCHAHED *v.* CITY OF LAS VEGAS, NEVADA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–6108. NEWTON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 371 F. 3d 250.

No. 04–6113. SMITH *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS. C. A. 10th Cir. Certiorari denied.

No. 04–6114. SMYRE *v.* YOUNG, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 04–6117. LOTUS *v.* COLORADO. Dist. Ct. Colo., Teller County. Certiorari denied.

No. 04–6118. KOSTER *v.* LUDWICK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6127. GRAZIANO *v.* CUNNINGHAM, SUPERINTENDENT, WOODBURNE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 78 Fed. Appx. 162.

No. 04–6129. GRANT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 58 P. 3d 783 and 95 P. 3d 178.

No. 04–6137. LIMEHOUSE *v.* STEAK & ALE RESTAURANT CORP. ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 850 A. 2d 302.

No. 04–6140. HARRISON *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 771.

No. 04–6146. PEREZ *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6149. BURNETT *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–6150. PIPER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 04–6151. FRANCOIS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 151.

No. 04–6153. WILSON *v.* TAYLOR. C. A. 5th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 282.

No. 04–6157. PRATT *v.* BELOM ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 969.

No. 04–6161. CANO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 04–6162. CANDELARIA *v.* UTAH. Ct. App. Utah. Certiorari denied.

No. 04–6163. BRANDON *v.* GOOD, ACTING SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6172. WALKER *v.* VAUGHN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6175. SMITH *v.* BRUCE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 342.

No. 04–6177. MACK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 4 App. Div. 3d 126, 771 N. Y. S. 2d 343.

No. 04–6184. GRIFFIN ET UX. *v.* TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 113 S. W. 3d 605.

No. 04–6211. BRISCOE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 102 Ohio St. 3d 1471, 809 N. E. 2d 1158.

No. 04–6216. BOULIER *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 81 Conn. App. 824, 841 A. 2d 1217.

No. 04–6226. MAYERS *v.* SEDGWICK CLAIMS MANAGEMENT SERVICES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 591.

No. 04–6237. ELLIS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 04–6246. STRONG *v.* MCCUSKEY, JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 04–6248. NAILOR *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 96 Fed. Appx. 2.

No. 04–6261. HIGHTOWER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–6272. PACE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–6274. WILLIAMS *v.* GARCIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 173.

No. 04–6281. LANEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 379 Md. 522, 842 A. 2d 773.

No. 04–6287. MACK *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 161 N. C. App. 595, 589 S. E. 2d 168.

No. 04–6292. ARNOLD *v.* TOWN OF SLAUGHTER, LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 321.

No. 04–6306. CHAYOON *v.* REELS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 355 F. 3d 141.

No. 04–6313. WENDT *v.* RAINEY, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL.

C. A. 5th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 303.

No. 04–6358. HENTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 374 F. 3d 467.

No. 04–6362. TAVERA-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 580.

No. 04–6363. YEKIMOFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–6371. FARRIS *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 98 Fed. Appx. 10.

No. 04–6379. LIMAS-HIDROGO *v.* UNITED STATES (Reported below: 101 Fed. Appx. 516); MENDEZ-LEMOS *v.* UNITED STATES (101 Fed. Appx. 466); GALLEGOS-FLORES, AKA GUTIERREZ-CABRERA *v.* UNITED STATES (101 Fed. Appx. 513); HERNANDEZ-ESTALA *v.* UNITED STATES (101 Fed. Appx. 458); MEJIA-CARDENAS *v.* UNITED STATES (101 Fed. Appx. 511); SALDANA-SILVA *v.* UNITED STATES (101 Fed. Appx. 451); RODRIGUEZ-FLORES, AKA MILLAN-FLORES *v.* UNITED STATES (101 Fed. Appx. 541); MARTINEZ-RIOS *v.* UNITED STATES (101 Fed. Appx. 520); OCHOA-CORNEJO *v.* UNITED STATES (101 Fed. Appx. 496); BLAS-LOPEZ *v.* UNITED STATES; BENAVIDES-DAVILA *v.* UNITED STATES; HERNANDEZ-PUGA *v.* UNITED STATES (101 Fed. Appx. 463); SOLIS-LUNA, AKA REYNA *v.* UNITED STATES (101 Fed. Appx. 489); BRISENO-LEMOS *v.* UNITED STATES; RIOS-MARTINEZ *v.* UNITED STATES; SANCHEZ-RODRIGUEZ, AKA LOPEZ-RODRIGUEZ *v.* UNITED STATES (101 Fed. Appx. 491); SANCHEZ-LOREDO *v.* UNITED STATES (101 Fed. Appx. 551); RECIO-ROSAS, AKA RODRIGUEZ-GONZALEZ *v.* UNITED STATES (101 Fed. Appx. 490); and FLORES-JULIAN *v.* UNITED STATES (101 Fed. Appx. 500). C. A. 5th Cir. Certiorari denied.

No. 04–6382. COFIELD *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 154 Md. App. 695.

No. 04–6384. MARTINEZ-HUITRON *v.* UNITED STATES; MARTINEZ-SANCHEZ *v.* UNITED STATES; MIRELES-TORRES *v.* UNITED STATES; ORDUNA-OCHOA *v.* UNITED STATES; OSORIO DE

KEITH, AKA KEITH, AKA GONZALEZ, AKA GONZALEZ DE GOMEZ *v.* UNITED STATES; RAMOS-PENA *v.* UNITED STATES; ROJAS-MONDRAGON *v.* UNITED STATES; VALDEZ-ORTIZ *v.* UNITED STATES; and ZAPATA-IBARRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 455 (sixth judgment), 457 (fourth judgment), 460 (eighth judgment), 462 (seventh judgment), 497 (third judgment), 529 (second judgment), and 555 (fifth judgment).

No. 04–6385. MELGAR-ARRAZOLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 558.

No. 04–6387. GENSEL *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6392. MARINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6396. GUZMAN-RAMIREZ *v.* UNITED STATES; NAVARRO-PEREZ *v.* UNITED STATES; BAIRES-ABARCA *v.* UNITED STATES; HERNANDEZ-JUAREZ *v.* UNITED STATES; and MENDEZ-MADRID *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 534 (third judgment), 548 (second judgment), and 976 (fifth judgment); 106 Fed. Appx. 291 (fourth judgment).

No. 04–6397. GONZALES-VELASQUEZ *v.* UNITED STATES; DAMIAN-GARCIA *v.* UNITED STATES; OLIVA-BANEGAS *v.* UNITED STATES; GONZALEZ-JIMENEZ *v.* UNITED STATES; AGUILERA-GUERRERO, AKA RANGEL *v.* UNITED STATES; BANEGAS-SANCHEZ *v.* UNITED STATES; and RANGEL-RENDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 465 (second judgment) and 546 (fifth judgment); 102 Fed. Appx. 851 (first judgment); 104 Fed. Appx. 1000 (third judgment); 105 Fed. Appx. 637 (seventh judgment); 108 Fed. Appx. 879 (fourth judgment) and 880 (sixth judgment).

No. 04–6398. GALINDO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 637.

No. 04–6401. SABETTA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 373 F. 3d 75.

No. 04–6402. REED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 519.

No. 04–6405. STRONG *v.* BAKER, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 04–6410. BROOKS *v.* SMITH, SUPERINTENDENT, CASWELL CORRECTIONAL CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 936.

No. 04–6411. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 507.

No. 04–6412. BLOOMQUIST *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 893.

No. 04–6415. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–6417. GUTIERREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 172.

No. 04–6418. GILLAUM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 372 F. 3d 848.

No. 04–6420. GAINES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 859 A. 2d 651.

No. 04–6422. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–6424. GARCIA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 459.

No. 04–6425. FARMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 418.

No. 04–6427. CHAVIRA-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 952.

No. 04–6429. CAMPBELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 88 Fed. Appx. 465.

No. 04–6433. LONG *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 268 Conn. 508, 847 A. 2d 862.

No. 04–6435. ANDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 390.

No. 04–6437. REID *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–6440. REED *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. C. A. 9th Cir. Certiorari denied.

No. 04–6443. GUNTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 527.

No. 04–6445. DANIEL *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6447. CORTEZ-VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 544.

No. 04–6448. DEMJANJUK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 367 F. 3d 623.

No. 04–6452. ANTHES *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–6457. VILLALBA-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 251.

No. 04–6458. WRIGHT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 89 Fed. Appx. 733.

No. 04–6459. WOODWORTH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–6460. WATSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 04–6463. NOLAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 152.

No. 04–6464. PONDER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–6466. BOLZER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 367 F. 3d 1032.

No. 04–6467. CRIPPEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 371 F. 3d 842.

No. 04–6473. RAMOS-FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 721.

No. 04–6474. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 99 Fed. Appx. 372.

No. 04–6475. SAUCEDO-VASQUEZ, AKA BELLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 389.

No. 04–6476. LOZANO RIVAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 498.

No. 04–6479. WARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 665.

No. 04–6481. ARANO-LARA *v.* UNITED STATES (Reported below: 101 Fed. Appx. 453); CHAVEZ-MUNIZ *v.* UNITED STATES (101 Fed. Appx. 474); ESCALANTE-ALONZO *v.* UNITED STATES (101 Fed. Appx. 524); GARCIA-RIOS *v.* UNITED STATES (101 Fed. Appx. 485); GONZALEZ-AVILA *v.* UNITED STATES; HUERTA-PIMENTAL, AKA HUERTA *v.* UNITED STATES (101 Fed. Appx. 508); MIRANDA-BARRERA *v.* UNITED STATES (101 Fed. Appx. 505); MONTELONGO-CHAVEZ *v.* UNITED STATES (101 Fed. Appx. 506); RUIZ-RUIZ, AKA BAUELOS-GARCIA, AKA BANUELOS-GARCIA *v.* UNITED STATES (101 Fed. Appx. 471); and TISCARENO-RUELAS *v.* UNITED STATES (101 Fed. Appx. 477). C. A. 5th Cir. Certiorari denied.

No. 04–6483. PULIDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 446.

No. 04–6485. SKINNER, AKA WILLIS, AKA SHARP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–6488. OLIVAS-QUIROZ, AKA QUIROZ-OLIVAS *v.* UNITED STATES; and PETRONI-ADAME *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 553 (first judgment).

No. 04–6492. BUITRON-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 533.

No. 04–6494. MENDOZA-MORALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–6495. MEDRANO-JASSO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 518.

No. 04–6496. AGUILAR-ALARCON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–6497. RODRIGUEZ-HORTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 895.

No. 04–6501. LOZOYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 472.

No. 04–6504. MUHAMMAD *v.* LAMANNA, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 04–6508. VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 478.

No. 04–6509. BOXLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 373 F. 3d 759.

No. 04–6510. MADDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 331.

No. 04–6511. JAMERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 965.

No. 04–6512. CAMARILLO-VELASQUEZ, AKA GALVEZ, AKA SIERRA, AKA CANDELARIO GALVES, AKA GAMEZ, AKA GALVES, AKA CAMARILLO, AKA GUERRA *v.* UNITED STATES (Reported below: 101 Fed. Appx. 495); CARDONA-MENDEZ *v.* UNITED STATES (101 Fed. Appx. 530); DELGADO-BALDERAS *v.* UNITED STATES (101 Fed. Appx. 531); ESCOBEDO-SOLTERO *v.* UNITED STATES; LUCERO-ESTRADA *v.* UNITED STATES (101 Fed. Appx. 537); MEDINA-MARTINEZ *v.* UNITED STATES (101 Fed. Appx. 484); MONTOYA-NAVA *v.* UNITED STATES; MUNOZ-MORQUECHO, AKA MUNOZ, AKA MORQUECHO, AKA CONTRERAS, AKA ESTRADA CONTRERAS, AKA MORQUECHO MUNOZ, AKA MUNOS, AKA ESTRADA *v.* UNITED STATES; NAVA-VIRRUETA, AKA NAVA *v.* UNITED STATES (101 Fed. Appx. 526); RODRIGUEZ-PENA *v.* UNITED STATES (101 Fed. Appx. 554); SALAZAR-ARMENDARIZ *v.* UNITED STATES; VARELA-RODRIGUEZ *v.* UNITED STATES (101 Fed. Appx. 494); and VELASQUEZ-RODRIGUEZ *v.* UNITED STATES (101 Fed. Appx. 556). C. A. 5th Cir. Certiorari denied.

No. 04–6513. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–6514. EL-AMIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 780.

No. 04–6515. CASTRO *v.* ROMINE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 869.

No. 04–6516. JAMES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 588.

No. 04–6517. MURPHY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 04–6518. AHMED, AKA SHAH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 96 Fed. Appx. 773.

No. 04–6519. KING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–6525. OLIVAR-VERDIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 230.

No. 04–6531. NAVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 F. 3d 942.

No. 04–6533. OCHOA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 04–6535. DADI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–6537. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 13.

No. 04–6538. CAYTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 896.

No. 04–6541. DIBBLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 593.

No. 04–6542. CULOTTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 881.

No. 04–6546. WEST *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 103 Fed. Appx. 460.

No. 04–6547. WOLFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 778.

No. 04–6549. RIVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6551. SPEARS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 806.

No. 04–6555. SPOTTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 937.

No. 04–6560. MITCHELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 365 F. 3d 215.

No. 04–6563. KELLUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 372 F. 3d 1141.

No. 04–6575. GOMES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 376 F. 3d 42.

No. 04–6576. HAYNES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 372 F. 3d 1164.

No. 04–6580. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 966.

No. 04–6581. HERRERA-MATOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6582. GINEZ-PEREZ *v.* UNITED STATES (Reported below: 101 Fed. Appx. 564); DOMINGUEZ *v.* UNITED STATES (101 Fed. Appx. 458); MORENO-PEREZ *v.* UNITED STATES (101 Fed. Appx. 563); VILLALBA-FLORES *v.* UNITED STATES (101 Fed. Appx. 492); AYALA-CASTANON *v.* UNITED STATES (101 Fed. Appx. 560); GUTIERREZ-SALAZAR *v.* UNITED STATES (101 Fed. Appx. 464); RUIZ-SIMENTAL *v.* UNITED STATES (101 Fed. Appx. 559); GARCIA *v.* UNITED STATES (101 Fed. Appx. 483); PEREA-DE JARA *v.* UNITED STATES (101 Fed. Appx. 509); CANDANOZA-RUIZ *v.* UNITED STATES (101 Fed. Appx. 481); HERNANDEZ-ACOSTA, AKA JIMENEZ-ACOSTA *v.* UNITED STATES (101 Fed. Appx. 523); GONZALEZ *v.* UNITED STATES (101 Fed. Appx. 985); ACOSTA-HERNANDEZ *v.* UNITED STATES (101 Fed. Appx. 521); CHAVEZ-GUIDO *v.* UNITED STATES (101 Fed. Appx. 461); VALLE-RIVERA *v.* UNITED STATES (101 Fed. Appx. 538); FLORES-CORTEZ *v.* UNITED STATES; SANCHEZ-GARCIA *v.* UNITED STATES; CANTU-QUINTERO *v.* UNITED STATES; MARTINEZ-PENA *v.* UNITED STATES (101 Fed. Appx. 545); AGUILAR ARREOLA *v.* UNITED STATES (101 Fed.

Appx. 543); GOMEZ-HERNANDEZ *v.* UNITED STATES (101 Fed. Appx. 542); SOTELO-MORENO, AKA SOTELO, AKA GONZALEZ-MURRIETA *v.* UNITED STATES (101 Fed. Appx. 550); ROMERO-MARTINEZ *v.* UNITED STATES (101 Fed. Appx. 504); ALVARADO-RAMIREZ *v.* UNITED STATES (101 Fed. Appx. 501); CHAVEZ-TREJO *v.* UNITED STATES (101 Fed. Appx. 535); and VILLA-HERNANDEZ, AKA VILLAREAL-CORDOVA *v.* UNITED STATES (101 Fed. Appx. 488). C. A. 5th Cir. Certiorari denied.

No. 04–6584. STOKES, AKA MUHAMMED *v.* UNITED STATES PAROLE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 374 F. 3d 1235.

No. 04–6586. PORTILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 363 F. 3d 1161.

No. 04–6602. MARRANCA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 98 Fed. Appx. 179.

No. 04–6603. AMAYA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 76.

No. 04–6607. SWARTZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 237.

No. 04–6608. SAMUELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 869.

No. 04–6610. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 47.

No. 04–6619. CHAVEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–6620. DOE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 365 F. 3d 150.

No. 04–6622. CARRIZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 628.

No. 04–6623. ESCANDON-FIGUEROA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 560.

No. 04–6624. BUGG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 25.

No. 04–6631. LOPEZ-CARDENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 375.

No. 04–6632. COUNTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 377 F. 3d 486.

No. 04–6636. MARTINEZ-LEGARDA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 652.

No. 04–6645. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 334.

No. 04–6646. MASON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–87. KOYO SEIKO CO., LTD., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Motion of Government of Japan for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 354 F. 3d 1334.

No. 04–101. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* HOLLOWAY. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 355 F. 3d 707.

No. 04–237. IRVIN, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, IRVIN, ET AL. *v.* HYDROCHEM INC. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 367 F. 3d 473.

No. 04–6449. MEADOR *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 03–1402. SATRE-BUISSON *v.* ASHCROFT, ATTORNEY GENERAL, 541 U. S. 1086. Petition for rehearing denied.

No. 03–22. TROUT ET AL. *v.* JOHNSON, ACTING SECRETARY OF THE NAVY, ET AL., 540 U. S. 981. Motion for leave to file petition for rehearing denied.

NOVEMBER 8, 2004

Certiorari Granted—Vacated and Remanded

No. 04–46. WATT *v.* WASHINGTON. Ct. App. Wash. Certiorari granted, judgment vacated, and case remanded for further

consideration in light of *Crawford* v. *Washington*, 541 U. S. 36 (2004). Reported below: 117 Wash. App. 1089.

Miscellaneous Orders

No. 04M16. CARTER *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–2377. IN RE DISBARMENT OF VINYARD. Disbarment entered. [For earlier order herein, see 542 U. S. 956.]

No. D–2385. IN RE DISCIPLINE OF MASON. Reynold N. Mason, of Brooklyn, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2386. IN RE DISCIPLINE OF MCGOWAN. Edward Michael McGowan, of Maspeth, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 03–287. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. *v.* DOTSON ET AL. C. A. 6th Cir. [Certiorari granted, 541 U. S. 935.] Motion of respondents for divided argument granted.

No. 03–1164. VENEMAN, SECRETARY OF AGRICULTURE, ET AL. *v.* LIVESTOCK MARKETING ASSN. ET AL.; and

No. 03–1165. NEBRASKA CATTLEMEN, INC., ET AL. *v.* LIVESTOCK MARKETING ASSN. ET AL. C. A. 8th Cir. [Certiorari granted, 541 U. S. 1062.] Motion of the Acting Solicitor General for divided argument granted.

No. 03–1454. ASHCROFT, ATTORNEY GENERAL, ET AL. *v.* RAICH ET AL. C. A. 9th Cir. [Certiorari granted, 542 U. S. 936.] Motion of Drug Watch International for leave to file a brief as *amicus curiae* denied.

No. 03–9560. HOWELL, AKA COX *v.* MISSISSIPPI. Sup. Ct. Miss. [Certiorari granted, 542 U. S. 936.] Motion to appoint William Odum Richardson as counsel for petitioner granted. William Odum Richardson, Esq., of Fayetteville, N. C., is appointed

to serve as counsel for petitioner in this case. Motion to appoint Andre de Gruy as counsel for petitioner denied.

No. 04–5173. WRIGHT *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 806] denied.

No. 04–6787. IN RE STEELE; and
No. 04–6806. IN RE WOODBERRY. Petitions for writs of habeas corpus denied.

No. 04–5996. IN RE CASIANO;
No. 04–6423. IN RE NORMAN; and
No. 04–6658. IN RE WALKER. Petitions for writs of mandamus denied.

No. 04–311. IN RE RESEARCH AIR, INC., ET AL.; and
No. 04–6170. IN RE SCRUGGS. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Denied

No. 03–1655. LEWIS, AS PARENT AND GUARDIAN OF LEWIS, ET AL. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 384.

No. 03–10620. NELSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 347 F. 3d 701.

No. 03–10964. FRYE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 04–157. REEVES *v.* FURNES. C. A. 11th Cir. Certiorari denied. Reported below: 362 F. 3d 702.

No. 04–174. JOYCE ET AL. *v.* EAST TENNESSEE NATURAL GAS CO.; and
No. 04–221. GOFORTH ET AL. *v.* EAST TENNESSEE NATURAL GAS CO. C. A. 4th Cir. Certiorari denied. Reported below: 361 F. 3d 808.

No. 04–175. MUNTAQIM, AKA BOTTOM *v.* COOMBE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 366 F. 3d 102.

No. 04–183. IACABONI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 363 F. 3d 1.

No. 04–312. AMERICAN CHIROPRACTIC ASSN., INC., ET AL. *v.* TRIGON HEALTHCARE, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 367 F. 3d 212.

No. 04–313. PORTLAND PUBLIC SCHOOLS, MULTNOMAH SCHOOL DISTRICT NO. 1, ET AL. *v.* SETTLEGOODE. C. A. 9th Cir. Certiorari denied. Reported below: 371 F. 3d 503.

No. 04–315. WILFERT BROTHERS REALTY CO. ET AL. *v.* MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 441 Mass. 549, 808 N. E. 2d 205.

No. 04–316. UMS GENERALI MARINE S. P. A., FKA UNIONE MEDITERRANEA DI SICURTA *v.* ADAMS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 364 F. 3d 646.

No. 04–325. BRACKMAN *v.* INDIANA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 989.

No. 04–342. KINDER *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 129 S. W. 3d 5.

No. 04–343. RIOS-DE AGUAYO *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–360. HERNANDEZ-GALICIA ET AL. *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 631.

No. 04–415. LATIMER *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 427.

No. 04–455. MORSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 430.

No. 04–5440. BEAUDOIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 362 F. 3d 60.

No. 04–5584. NEWTON *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 354 F. 3d 776.

No. 04–5681. BENEFIEL *v.* DAVIS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 357 F. 3d 655.

No. 04–5686. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 356 F. 3d 1086 and 87 Fed. Appx. 650.

No. 04–6110. MORENO *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 04–6166. REED *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 875 So. 2d 415.

No. 04–6168. RODRIGUEZ *v.* GAILOR ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–6169. RIOS *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 582.

No. 04–6174. WOODMAN *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6178. JOHNSON *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 04–6182. CHARLES *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 634.

No. 04–6183. SEARLES *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–6191. ROJAS *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6194. MYERS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 359 S. C. 40, 596 S. E. 2d 488.

No. 04–6212. BARBER *v.* OHIO. Ct. App. Ohio, Fairfield County. Certiorari denied.

No. 04–6236. PURTLE *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 169.

No. 04–6239. DORAN-BEY *v.* BRUCE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 220.

No. 04–6240. CRANE *v.* ALBERTELLI. Ct. App. Ga. Certiorari denied. Reported below: 264 Ga. App. 910, 592 S. E. 2d 684.

No. 04–6259. HODGE ET VIR *v.* UNITED STATES POST OFFICE, LEXINGTON PARK, MARYLAND, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 04–6277. WILLIAMS *v.* HARVEY, ATTORNEY GENERAL OF NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 04–6288. JENDRZEJEWSKI *v.* LAVIGNE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6289. KASEMYAN *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–6301. NICKERSON *v.* POTTER, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 936.

No. 04–6305. DONALDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 902.

No. 04–6309. EADS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 799 N. E. 2d 1208.

No. 04–6321. ANDERSON *v.* TURNER ENTERTAINMENT NETWORKS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 152.

No. 04–6334. DRABOVSKIY *v.* KENTUCKY BOARD OF MEDICAL LICENSURE. Ct. App. Ky. Certiorari denied.

No. 04–6360. TIATIA *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6374. MCBRIDE *v.* BROWN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 636.

No. 04–6383. MANYPENNY *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 682 N. W. 2d 143.

No. 04–6399. NELSON *v.* HAMILTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 897.

No. 04–6414. KOGER *v.* KAPLAN, INC., ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6468. DREVDAHL *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6469. CALDERON *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 82 Conn. App. 315, 844 A. 2d 866.

No. 04–6522. DANIELS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 278 Kan. 53, 91 P. 3d 1147.

No. 04–6523. MILTON *v.* FARWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6626. ROBREDO *v.* PALISADES MEDICAL CENTER, NEW YORK PRESBYTERIAN HEALTHCARE SYSTEM. C. A. 3d Cir. Certiorari denied. Reported below: 95 Fed. Appx. 463.

No. 04–6637. ARMSTRONG *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 372 F. 3d 778.

No. 04–6649. PEDRAZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 314.

No. 04–6650. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–6653. COUCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 373.

No. 04–6657. ANDREWS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 894.

No. 04–6660. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 917.

No. 04–6664. CORREA, AKA ALVAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 362 F. 3d 1306.

No. 04–6665. EVANS *v.* UNITED STATES ATTORNEY ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–6672. MORRISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 939.

No. 04–6680. NORIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6686. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 780.

No. 04–6691. HAFF *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–6694. ROGERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–6699. GALVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 425.

No. 04–6704. GAUGHAN *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–6705. AILSWORTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 04–6706. HODGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6707. YUK RUNG TSANG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 318.

No. 04–6709. TERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 366 F. 3d 312.

No. 04–6712. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–6716. HERNANDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 931.

No. 04–6718. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–6724. PEREZ *v.* HASTINGS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–6728. DORMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 228.

No. 04–6729. DOMINGUEZ-GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 429.

No. 04–6746. BRASLAU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 417.

No. 03–1597. LOCKE, GOVERNOR OF WASHINGTON, ET AL. *v.* FARRAKHAN ET AL. C. A. 9th Cir. Motion of Thomas Johnson et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 338 F. 3d 1009.

No. 04–242. EMMERMAN ET VIR *v.* CITY OF HIGHLAND PARK, ILLINOIS, ET AL. App. Ct. Ill., 2d Dist. Motion of National Association of Home Builders for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 344 Ill. App. 3d 259, 799 N. E. 2d 781.

No. 04–330. LARIMER *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 7th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 370 F. 3d 698.

Rehearing Denied

No. 03–10106. ATAMIAN *v.* HAWK ET AL., *ante*, p. 825;
No. 03–10373. IN RE COLE, *ante*, p. 808;
No. 03–10678. BEATON-PAEZ *v.* UNITED STATES, *ante*, p. 844;
No. 03–10683. IN SOO CHUN *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL., *ante*, p. 844;
No. 03–11006. KIRKHAM, AKA RO *v.* UNITED STATES, *ante*, p. 863; and
No. 04–5159. HIGGINS *v.* BUREAU OF CUSTOMS ET AL., *ante*, p. 885. Petitions for rehearing denied.

NOVEMBER 9, 2004

Dismissal Under Rule 46

No. 04–93. POEPPEL *v.* HARTFORD INSURANCE CO. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 87 Fed. Appx. 885.

NOVEMBER 10, 2004

Dismissal Under Rule 46

No. 04–462. BOARD OF EDUCATION OF THE WAPPINGERS FALLS CENTRAL SCHOOL DISTRICT ET AL. *v.* ABRAHAMSON ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 374 F. 3d 66.

NOVEMBER 15, 2004

Certiorari Granted—Vacated and Remanded

No. 02–813. GREEN FIRE & MARINE INSURANCE CO., LTD., FKA KUKJE HWAJAE INSURANCE CO., LTD. *v.* M/V HYUNDAI LIBERTY. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Norfolk Southern R. Co.* v. *James N. Kirby, Pty Ltd.*, *ante*, p. 14. Reported below: 294 F. 3d 1171.

No. 04–5876. ABUL-KABIR, FKA COLE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tennard* v. *Dretke*, 542 U. S. 274 (2004). Reported below: 99 Fed. Appx. 523.

Certiorari Granted—Reversed and Remanded. (See No. 04–5323, *ante*, p. 37.)

Certiorari Dismissed

No. 04–6290. LEVY *v.* FAIRFAX COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 04A259. GRAVES *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 04M17. JACKSON *v.* AMETEK, INC./HAVEG DIVISION;
No. 04M18. CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* DAVIS;
No. 04M19. STANKEWITZ *v.* BROWN, ACTING WARDEN;
No. 04M20. HENDERSON *v.* TENNESSEE; and
No. 04M21. ERICKSON *v.* WATERTOWN HEALTH DEPARTMENT ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 03–1294. HALL *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 542 U. S. 918.] Motion of petitioner for appoint-

ment of counsel granted. Sharon Samek, Esq., of Tampa, Fla., is appointed to serve as counsel for petitioner in this case.

No. 03–8661. SMITH *v.* MASSACHUSETTS. App. Ct. Mass. [Certiorari granted, 542 U. S. 903.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–5154. ORTLOFF *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 803] denied.

No. 04–6297. JEVTIC *v.* LIBERTY MUTUAL INSURANCE CO. Sup. Ct. N. Y., Erie County; and

No. 04–6314. IN RE TAHA. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until December 6, 2004, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 04–6869. IN RE SMITH. Petition for writ of habeas corpus denied.

No. 03–10574. IN RE SHEMONSKY;

No. 03–10857. IN RE SHEMONSKY;

No. 04–346. IN RE GRACE ET AL.; and

No. 04–6318. IN RE ANDERSON. Petitions for writs of mandamus denied.

Certiorari Denied

No. 03–1581. KNIGHT-RIDDER, INC. *v.* CAPITAL FACTORS, INC.; and

No. 03–1583. HANDLEMAN CO. *v.* CAPITAL FACTORS, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 359 F. 3d 866.

No. 03–8968. VENEGAS-ORNELAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 348 F. 3d 1273.

No. 03–9345. OWEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 862 So. 2d 687.

No. 04–107. CIBAO MEAT PRODUCTS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 84 Fed. Appx. 155.

No. 04–113. LOULOU *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 354 F. 3d 706.

No. 04–184. C. M. C. *v.* G. A. L. ET UX. Sup. Ct. Colo. Certiorari denied. Reported below: 88 P. 3d 599.

No. 04–323. GIDDINGS *v.* NORTHERN TELECOM, INC., ET AL. Ct. App. Colo. Certiorari denied.

No. 04–327. SSA GULF, INC., FKA SSA GULF TERMINALS, INC. *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA. C. A. 5th Cir. Certiorari denied.

No. 04–328. TURNER ET AL. *v.* COOK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 362 F. 3d 1219.

No. 04–329. TALLY ET AL. *v.* EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA, ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 91 P. 3d 605.

No. 04–345. DONAHUE *v.* CITY OF BOSTON, MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 371 F. 3d 7.

No. 04–347. HERERO PEOPLE'S REPARATION CORP. ET AL. *v.* DEUTSCHE BANK, A. G., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 370 F. 3d 1192.

No. 04–349. GASS ET AL. *v.* ALLEGHENY COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 371 F. 3d 134.

No. 04–351. LACY ET AL. *v.* CSX TRANSPORTATION, INC. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 04–355. JOU *v.* FIRST INSURANCE COMPANY OF HAWAII, LTD. Sup. Ct. Haw. Certiorari denied.

No. 04–361. CLISSURAS ET AL. *v.* CITY UNIVERSITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 359 F. 3d 79 and 90 Fed. Appx. 566.

No. 04–382. SHAIEB *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–388. WASHBURN *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 328.

No. 04–395. CHIPPEWA TRADING CO. *v.* COX, ATTORNEY GENERAL OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 365 F. 3d 538.

No. 04–399. ITTELLA FOODS, INC. *v.* ZURICH INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 689.

No. 04–404. HERMAN ET AL. *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 474.

No. 04–412. CUYLER, SPECIAL ADMINISTRATOR OF THE ESTATE OF CUYLER, DECEASED *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 362 F. 3d 949.

No. 04–418. GARY S. ET UX., INDIVIDUALLY AND ON BEHALF OF THEIR SON, ANDREW S. *v.* MANCHESTER SCHOOL DISTRICT. C. A. 1st Cir. Certiorari denied. Reported below: 374 F. 3d 15.

No. 04–419. SOUTHERN *v.* POWELL, SECRETARY OF STATE. C. A. D. C. Cir. Certiorari denied.

No. 04–443. DRAPER *v.* REYNOLDS. C. A. 11th Cir. Certiorari denied. Reported below: 369 F. 3d 1270.

No. 04–458. MARSHALL *v.* BOWLES, JUDGE. C. A. 6th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 283.

No. 04–497. DEJOHN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 368 F. 3d 533.

No. 04–512. KROUSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 370 F. 3d 965 and 100 Fed. Appx. 668.

No. 04–513. NG, AKA ENG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–533. KOLOSKY *v.* FAIRVIEW UNIVERSITY MEDICAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 64.

No. 04–5593. SMITH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 6 App. Div. 3d 338, 775 N. Y. S. 2d 148.

No. 04–5689. RIOS-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 376 F. 3d 303 and 98 Fed. Appx. 322.

No. 04–6195. BAGWELL *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 372 F. 3d 748.

No. 04–6197. CHI *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–6203. BRENNAN *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–6204. MCKENZIE *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 362.

No. 04–6207. MILLER *v.* TRAWICK ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6208. SPOTTSVILLE *v.* TERRY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–6210. SANDERS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6213. ROYSTER *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–6214. SHAW *v.* WORKMAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 04–6215. REID *v.* EARLY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6222. BONILLA *v.* HURLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 370 F. 3d 494.

No. 04–6227. WASHINGTON *v.* BROWN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 165.

No. 04–6231. BARRON *v.* SHEEDY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 416.

No. 04–6232. CREVELING *v.* MOHAVE COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–6233. NEWBURY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 135 S. W. 3d 22.

No. 04–6241. MURRAY *v.* PERLOW. C. A. 1st Cir. Certiorari denied. Reported below: 96 Fed. Appx. 5.

No. 04–6244. MORRILL *v.* JOHNS HOPKINS UNIVERSITY. Ct. Sp. App. Md. Certiorari denied. Reported below: 154 Md. App. 697 and 699.

No. 04–6250. MARTIN *v.* WORKMAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–6251. LARRIMORE *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 197.

No. 04–6253. PHILLIPS *v.* LANSING SCHOOL DISTRICT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 570.

No. 04–6254. ELROD *v.* SUPREME COURT OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 506.

No. 04–6255. DAVIS *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6262. HALEY *v.* GALLOWAY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 379.

No. 04–6267. PEREZ GUZMAN *v.* ROSSELLO GONZALEZ ET AL. Sup. Ct. P. R. Certiorari denied.

No. 04–6268. LACKING *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 04–6269. LONGWORTH *v.* LANE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6270. WILLIAMS *v.* DAHM, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 04–6271. WARD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–6275. WALKER *v.* FAMILY INDEPENDENCE AGENCY. Ct. App. Mich. Certiorari denied.

No. 04–6283. MISSOURI EX REL. TOMPRAS ET AL. *v.* BOARD OF ELECTION COMMISSIONERS OF ST. LOUIS COUNTY ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 136 S. W. 3d 65.

No. 04–6291. R. M. *v.* RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 04–6293. MURPHY *v.* MISSOURI DEPARTMENT OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 372 F. 3d 979.

No. 04–6294. POWELL *v.* SCOTT, ADMINISTRATOR, SOUTHWESTERN REGIONAL JAIL. Cir. Ct. Wetzel County, W. Va. Certiorari denied.

No. 04–6296. LEWIS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6303. SVANHOLM *v.* MONTGOMERY COUNTY, MARYLAND, ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 150 Md. App. 708 and 710.

No. 04–6304. DEBLASE *v.* KLEM, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6308. SCALES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6311. DOMINGUEZ *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6325. WHITE *v.* MORGAN, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 370 F. 3d 1002.

No. 04–6332. KOEHL *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–6333. MARTIN *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 900.

No. 04–6431. BROWN *v.* MISSOURI BOARD OF PROBATION AND PAROLE. C. A. 8th Cir. Certiorari denied.

No. 04–6450. JOY *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6498. SMITH *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 162 N. C. App. 723, 592 S. E. 2d 294.

No. 04–6502. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 04–6520. JACKSON *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6527. RUSSELL *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 183.

No. 04–6558. BRYSON ET AL. *v.* JOHNSTON, JUDGE, SUPERIOR COURT OF NORTH CAROLINA, MECKLENBURG COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 417.

No. 04–6595. HULLUM *v.* DENNEHY, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied. Reported below: 105 Fed. Appx. 278.

No. 04–6601. MAUWEE *v.* HELLING, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6606. AL-AMIN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 278 Ga. 74, 597 S. E. 2d 332.

No. 04–6611. VERDUZCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 373 F. 3d 1022.

No. 04–6720. HARGROVE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–6737. MITCHELL, AKA GREENE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 5.

No. 04–6741. SCHNUPP, AKA LYLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 368 F. 3d 331.

No. 04–6744. SERRANO-LUVIANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 1.

No. 04–6748. WOOTEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 377 F. 3d 1134.

No. 04–6751. BURBAGE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 365 F. 3d 1174.

No. 04–6753. DILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–6759. STUBBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 103 Fed. Appx. 471.

No. 04–6769. BURRELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 384 F. 3d 22.

No. 04–6770. PETRUCELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 97 Fed. Appx. 355.

No. 04–6772. WYNN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 325.

No. 04–6773. WADE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 2.

No. 04–6776. MATHIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 666.

No. 04–6783. MEDINA-ROMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 376 F. 3d 1.

No. 04–6800. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 926.

No. 04–6801. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 985.

No. 04–6812. PAYNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 213.

No. 04–6815. SPENCER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 374 F. 3d 321.

No. 04–6816. CHEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 378 F. 3d 151.

No. 04–6818. RICHBURG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6833. MINUTOLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 374 F. 3d 236.

No. 04–6835. MARTINEZ-MENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 428.

No. 04–6839. APODACA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 300.

No. 04–6843. DE JESUS-MATEO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 373 F. 3d 70.

No. 04–6846. FLORES-BARAJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 600.

No. 04–6847. GADSDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 503.

No. 04–6850. JANGULA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 907.

No. 04–6852. MADRID-CORTEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 290.

No. 04–6859. POUX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 182.

No. 04–6860. POWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6863. LESLIE *v.* HOLDER, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 880.

No. 04–6872. CALDWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–6877. LEBLANC *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 882.

No. 04–6893. WOLFE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 286.

No. 04–6898. VASQUEZ-FONSECA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 611.

No. 04–6899. JOELSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–1514. UNITED STATES *v.* VARGAS-DURAN. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 356 F. 3d 598.

No. 04–181. IRVING PULP & PAPER, LTD., DBA IRVING PAPER *v.* CAPITAL FACTORS, INC. C. A. 7th Cir. Motion of Travelers Casualty and Surety Company of America et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 359 F. 3d 866.

No. 04–333. LOWE *v.* WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 90 Fed. Appx. 388.

No. 04–354. KENNEDY ET UX. *v.* CHASE MANHATTAN BANK, USA, NA, ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 369 F. 3d 833.

No. 04–6242. KLAT *v.* CALIFORNIA BOARD OF REGISTERED NURSING. Ct. App. Cal., 3d App. Dist. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 04–6609. ROBINSON *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 107 Fed. Appx. 711.

Rehearing Denied

No. 03–10245. ERICKSON *v.* WATERTOWN HEALTH DEPARTMENT ET AL., *ante*, p. 829;

No. 03–10873. GARCIA *v.* TEXAS, *ante*, p. 855;

No. 04–297. IN RE CALIFORRNIAA, *ante*, p. 807;

No. 04–5455. MOORE *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON ET AL., *ante*, p. 901; and

No. 04–5491. BLOOME *v.* DEPARTMENT OF THE TREASURY ET AL., *ante*, p. 902. Petitions for rehearing denied.

No. 03–10527. KLAT *v.* CALIFORNIA BOARD OF REGISTERED NURSING, *ante*, p. 918; and

No. 03–10721. KLAT *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, *ante*, p. 918. Petitions for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions.

No. 03–6389. WILEY *v.* MCKEE, WARDEN, 540 U. S. 1008. Motion for leave to file petition for rehearing denied.

NOVEMBER 17, 2004

Miscellaneous Order

No. 04A417. FUENTES *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

NOVEMBER 18, 2004

Miscellaneous Order

No. 04A423 (04–7271). KUNKLE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court. THE CHIEF JUSTICE, JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS would deny the application for stay of execution.

NOVEMBER 22, 2004

Dismissal Under Rule 46

No. 04–338. ESPARZA ET UX., INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ESPARZA, DECEASED *v.* ANDREWS INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 96 Fed. Appx. 226.

NOVEMBER 29, 2004

Affirmed on Appeal

No. 04–218. RODRIGUEZ ET AL. *v.* PATAKI, GOVERNOR OF NEW YORK, ET AL. Affirmed on appeal from D. C. S. D. N. Y. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 308 F. Supp. 2d 346.

Certiorari Dismissed

No. 04–6480. MARTIN *v.* BRITTEN, WARDEN, ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 04–6886. STEELE *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 100 Fed. Appx. 773.

Miscellaneous Orders

No. 04M22. COLLINS *v.* SALAZAR, ATTORNEY GENERAL OF COLORADO;

No. 04M23. CHRISTENSEN *v.* WINTER PARK, FLORIDA;

No. 04M24. WHITE *v.* COMMUNICATION WORKERS OF AMERICA, AFL–CIO, LOCAL 13000;

No. 04M25. STEWART *v.* PETERSON ET AL.;

No. 04M26. PATTERSON-BEGGS *v.* ALLIED BROKER'S INC. ET AL.;

No. 04M27. GLOBAL NAPS, INC. *v.* MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY ET AL.; and

No. 04M28. BELLE *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 03–1440. KALAMA SERVICES, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT

OF LABOR, ET AL., *ante*, p. 809. Motion of respondent Michael Ilaszczat for attorney's fees denied without prejudice to filing in the United States Court of Appeals for the Ninth Circuit.

No. 03–10958. MENDEZ *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 802] denied.

No. 03–11045. AZUBUKO *v.* BERKSHIRE MUTUAL INSURANCE CO. ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 803] denied.

No. 04–5104. SIEGEL *v.* CRESCENT RESOURCES, LLC, ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 803] denied.

No. 04–5726. SMITH *v.* GRIMES, JUDGE, COURT OF COMMON PLEAS, 13TH JUDICIAL DISTRICT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 921] denied.

No. 04–6249. PATTERSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 921] denied.

No. 04–6421. GOINS *v.* LOCAL 2047 I L A EXECUTIVE BOARD. C. A. 5th Cir.; and

No. 04–6913. STEPHANATOS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until December 20, 2004, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 04–6991. IN RE WOODBERRY; and

No. 04–6995. IN RE CHILDS. Petitions for writs of habeas corpus denied.

No. 03–10769. IN RE SHEMONSKY;
No. 03–11046. IN RE WILLIAMS;
No. 04–5947. IN RE JACKSON;
No. 04–6453. IN RE BROWN; and
No. 04–6927. IN RE JOHNSON. Petitions for writs of mandamus denied.

No. 04–6540. IN RE CURRIE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 04–5286. DODD *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 365 F. 3d 1273.

Certiorari Denied

No. 03–10498. HIGGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 353 F. 3d 281.

No. 03–10810. CLAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 355 F. 3d 1281.

No. 03–10891. ALLEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 369 F. 3d 682.

No. 03–11040. WILLIAMS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 364 F. 3d 235.

No. 04–150. CHARLESTON COUNTY, SOUTH CAROLINA, ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 365 F. 3d 341.

No. 04–154. MEDIA GENERAL OPERATIONS, INC., DBA RICHMOND TIMES-DISPATCH *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 360 F. 3d 434.

No. 04–168. GRIMM *v.* SPELL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 881.

No. 04–186. KOZIARA ET AL. *v.* SEMINOLE COUNTY, FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 873 So. 2d 374.

No. 04–197. KILCULLEN *v.* LEWIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 382.

No. 04–232. TENENBAUM ET UX. *v.* SIMONINI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 372 F. 3d 776 and 96 Fed. Appx. 998.

No. 04–233. NXIVM CORP. ET AL. *v.* ROSS INSTITUTE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 364 F. 3d 471.

No. 04–245. ALT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 34.

No. 04–246. AQUALINE ASSOCIATES, LTD. *v.* GENESIS HEALTH VENTURES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 132.

No. 04–249. WELLS *v.* CITY OF ALEXANDRIA, LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–283. LUBETZKY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–287. CITY OF MARYSVILLE, WASHINGTON *v.* VINE STREET COMMERCIAL PARTNERSHIP ET AL. Ct. App. Wash. Certiorari denied. Reported below: 118 Wash. App. 1027.

No. 04–288. ROMERO *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–295. FLORIDA *v.* GROSVENOR. Sup. Ct. Fla. Certiorari denied. Reported below: 874 So. 2d 1176.

No. 04–364. PRE-PAID LEGAL SERVICES, INC., ET AL. *v.* BRADLEY ET AL.; PRE-PAID LEGAL SERVICES, INC., ET AL. *v.* BROWNLOW ET AL.; and PRE-PAID LEGAL SERVICES, INC., ET AL. *v.* MEALEY ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 874 So. 2d 972 (second judgment) and 984 (first judgment); 875 So. 2d 1075 (third judgment).

No. 04–374. BARNES *v.* JOHNSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 534.

No. 04–375. DAHL *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 676 N. W. 2d 305.

No. 04–376. WOLFORD *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 411.

No. 04–377. BRAGER *v.* BRAGER. Ct. Sp. App. Md. Certiorari denied. Reported below: 153 Md. App. 716.

No. 04–378. O'NEILL *v.* CONTINENTAL AIRLINES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 968.

No. 04–379. RICHARD S. *v.* MISTY L. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 04–383. RANDLE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 910 So. 2d 836.

No. 04–384. SAWYER *v.* WORCESTER ET AL. Sup. Ct. Va. Certiorari denied.

No. 04–390. ROSSO *v.* A. I. ROOT CO. C. A. 6th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 517.

No. 04–396. CAREMARK RX, INC., FKA MEDPARTNERS, INC. *v.* JOHNSTON. Sup. Ct. Ala. Certiorari denied. Reported below: 916 So. 2d 632.

No. 04–401. VICENTE SANCHEZ *v.* MINSON CORP. C. A. 9th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 492.

No. 04–402. IVES *v.* BOONE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 274.

No. 04–406. GILCHRIST *v.* BOARD OF REVIEW OF THE OKLAHOMA EMPLOYMENT SECURITY COMMISSION ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 94 P. 3d 72.

No. 04–407. BARKER SANITATION *v.* CITY OF NEBRASKA CITY, NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 514.

No. 04–408. PARALIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 832 A. 2d 541.

No. 04–409. TRICITY BEHAVIORAL HEALTH SERVICES, INC. *v.* ARIZONA DEPARTMENT OF HEALTH SERVICES ET AL. Ct. App. Ariz. Certiorari denied.

No. 04–410. BERTRAND, WARDEN *v.* OSWALD. C. A. 7th Cir. Certiorari denied. Reported below: 374 F. 3d 475.

No. 04–413. CITY OF ALBUQUERQUE, NEW MEXICO *v.* HOMANS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 366 F. 3d 900.

No. 04–416. BAUM *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 04–420. LARGESS *v.* SUPREME JUDICIAL COURT OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 373 F. 3d 219.

No. 04–421. CLUB CAR (QUEBEC) IMPORT, INC., ET AL. *v.* CLUB CAR, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 362 F. 3d 775.

No. 04–422. MILLS *v.* C. H. I. L. D., INC., ET AL. Sup. Ct. R. I. Certiorari denied. Reported below: 837 A. 2d 714.

No. 04–424. HOULT *v.* HOULT. C. A. 1st Cir. Certiorari denied. Reported below: 373 F. 3d 47.

No. 04–425. HOFFMANN ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 96 Fed. Appx. 717.

No. 04–426. GARTER BELT, INC., DBA LEGG'S LOUNGE *v.* CHARTER TOWNSHIP OF VAN BUREN. Ct. App. Mich. Certiorari denied. Reported below: 258 Mich. App. 594, 673 N. W. 2d 111.

No. 04–427. RICHARDS *v.* TEXAS A&M UNIVERSITY SYSTEM ET AL. Ct. App. Tex., 10th Dist. Certiorari denied. Reported below: 131 S. W. 3d 550.

No. 04–428. STAMPS ET UX. *v.* LOUISIANA ATTORNEY DISCIPLINARY BOARD. Sup. Ct. La. Certiorari denied. Reported below: 874 So. 2d 113.

No. 04–431. JONAS *v.* TOWN OF YEMASSEE MUNICIPAL COURT, SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 32.

No. 04–432. PHYSICIANS MULTISPECIALTY GROUP *v.* HEALTH CARE PLAN OF HORTON HOMES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 371 F. 3d 1291.

No. 04–434. WETZEL *v.* ILLINOIS ET AL. Sup. Ct. Ill. Certiorari denied.

No. 04–436. MOTT *v.* GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 309 App. Div. 2d 162, 765 N. Y. S. 2d 383.

No. 04–441. MENON *v.* DUX. App. Ct. Conn. Certiorari denied. Reported below: 81 Conn. App. 167, 838 A. 2d 1038.

No. 04–442. DELGADO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DELGADO *v.* REEF RESORTS LTD., DBA RAMON'S VILLAGE RESORT. C. A. 5th Cir. Certiorari denied. Reported below: 364 F. 3d 642.

No. 04–445. ANANDANADESAN ET AL. *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 588.

No. 04–453. DOKIC *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 46.

No. 04–456. KING *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 877 So. 2d 145.

No. 04–461. BODDEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 877 So. 2d 680.

No. 04–470. HIEN PHI HOANG *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 257.

No. 04–474. GOTTLIEB *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 88 Fed. Appx. 476.

No. 04–485. PELLEGRINI *v.* ANALOG DEVICES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 375 F. 3d 1113.

No. 04–493. NETZER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 269 Wis. 2d 542, 674 N. W. 2d 680.

No. 04–507. CHEWNING *v.* BRANCH BANKING AND TRUST. Ct. App. S. C. Certiorari denied.

No. 04–527. THERM-ALL, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 373 F. 3d 625.

No. 04–532. MARTIN *v.* KLINE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 105 Fed. Appx. 367.

No. 04–539. AMERICAN FAMILY ASSN., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 365 F. 3d 1156.

No. 04–546. ARMSTRONG *v.* RUSHTON, TRUSTEE, ET AL.; ARMSTRONG *v.* RUSHTON, TRUSTEE, ET AL.; ARMSTRONG *v.* RUSHTON, TRUSTEE, ET AL.; ARMSTRONG *v.* RUSTON, TRUSTEE, ET AL.; and ARMSTRONG *v.* RUSHTON, TRUSTEE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 285 (fourth judgment); 99 Fed. Appx. 860 (first judgment) and 866 (third judgment); 101 Fed. Appx. 766 (second judgment).

No. 04–554. SHIPSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 363 F. 3d 962.

No. 04–556. LENOCI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 377 F. 3d 246.

No. 04–5226. HIGGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 37.

No. 04–5302. SNYDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 57.

No. 04–5386. BRAZZEL *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 118 Wash. App. 1054.

No. 04–5441. MAGALLANES-NIETO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 581.

No. 04–5442. MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 371 F. 3d 446.

No. 04–5456. DE ANDA-DUENEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 197.

No. 04–5502. WILL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–5540. WATTS *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 592.

No. 04–5703. PARIS *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 10th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 810.

No. 04–5930. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 367 F. 3d 278.

No. 04–5993. WAGGONER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 339 F. 3d 915.

No. 04–6039. MCNABB *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 887 So. 2d 998.

No. 04–6042. KEY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 891 So. 2d 384.

No. 04–6052. CEBALLOS-MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 371 F. 3d 713.

No. 04–6336. RUNNING *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 336 Ore. 545, 87 P. 3d 661.

No. 04–6337. BREWINGTON *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6338. MCELHANEY *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6345. JACKSON *v.* CAMBRA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–6347. ROBINSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 910 So. 2d 838.

No. 04–6352. ROCHESTER *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 718.

No. 04–6353. STRAUGHTER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–6355. SIMMONS *v.* CAMBRA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–6357. MILLER *v.* SMITH, WARDEN. Super. Ct. Tattnall County, Ga. Certiorari denied.

No. 04–6365. YANT *v.* GUNDY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 403.

No. 04–6367. CONSTANT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 3 App. Div. 3d 537, 770 N. Y. S. 2d 635.

No. 04–6369. COFIELD *v.* SMITH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 794.

No. 04–6375. MULLIN *v.* DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION. Ct. App. D. C. Certiorari denied. Reported below: 844 A. 2d 1138.

No. 04–6376. MONK *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6380. MIDKIFF *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6388. LYLES *v.* SEACOR MARINE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 432.

No. 04–6389. JOHNSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6391. JOHNSON *v.* COOLMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 460.

No. 04–6395. FAYED *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 849 A. 2d 603.

No. 04–6400. POTTS *v.* OHIO. Ct. App. Ohio, Richland County. Certiorari denied.

No. 04–6404. SKUNDOR *v.* GANDEE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 923.

No. 04–6406. SANDERS *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 520.

No. 04–6407. BELL *v.* PAPPERT, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6409. WILKERSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–6426. HAYES *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 103.

No. 04–6430. COOPER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 04–6439. PROBST *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6442. KERR *v.* BEY. C. A. 6th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 558.

No. 04–6451. JUSTICE *v.* COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT. Sup. Ct. Cal. Certiorari denied.

No. 04–6455. ROGERS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 272 Wis. 2d 855, 679 N. W. 2d 927.

No. 04–6465. ESTEVEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 04–6472. DEWS *v.* GALAZA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6486. MONSIVAIS SALAZAR *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6487. PEARSON *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 861 So. 2d 283.

No. 04–6489. WEBSTER *v.* BROWN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 361 F. 3d 522 and 369 F. 3d 1062.

No. 04–6493. BULLOCK *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6499. ANSON *v.* BAY AREA AIR QUALITY MANAGEMENT DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 603.

No. 04–6503. OROZCO *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 117 Cal. App. 4th 170, 11 Cal. Rptr. 3d 573.

No. 04–6505. JOHNSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 576 Pa. 23, 838 A. 2d 663.

No. 04–6506. REYNOLDS *v.* WHITE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6507. WALLACE *v.* DAVIS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 362 F. 3d 914.

No. 04–6529. SUDDETH *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 696.

No. 04–6532. PRUDE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 2 App. Div. 3d 1320, 768 N. Y. S. 2d 912.

No. 04–6534. MORENO-MONTANO *v.* JACQUERT, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 04–6536. CLARK *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 623.

No. 04–6539. COLT *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6543. THOMPSON *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6544. WILLIBY *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 04–6545. VALDEZ, AKA LALO VALDEZ *v.* BRAVO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 373 F. 3d 1093.

No. 04–6548. SMITH *v.* WINARD. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 868.

No. 04–6550. RICHARDSON *v.* EAGLETON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 951.

No. 04–6559. JOHNSON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6567. DOLLISON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied.

No. 04–6569. MARIANO *v.* CENTRAL PACIFIC BANK. C. A. 9th Cir. Certiorari denied.

No. 04–6600. GORDON *v.* GORDON. Super. Ct. Pa. Certiorari denied. Reported below: 839 A. 2d 1167.

No. 04–6617. MOORER *v.* PRICE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6625. SKUNDOR *v.* COLEMAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 257.

No. 04–6627. BETH R. *v.* FORRESTVILLE VALLEY COMMUNITY SCHOOL DISTRICT #221. C. A. 7th Cir. Certiorari denied. Reported below: 375 F. 3d 603.

No. 04–6630. CULVER *v.* DESUTA, SUPERINTENDENT, STATE REGIONAL CORRECTIONAL FACILITY AT MERCER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6647. BURKS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied.

No. 04–6661. WEATHERSPOON *v.* VANDERBILT UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 957.

No. 04–6678. REED-BEY *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 04–6681. CHAMBERS *v.* ESTEP, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–6700. GALVAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–6710. ODUOK *v.* COBB COUNTY BOARD OF COMMISSIONERS ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6714. PERRY *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 95 Fed. Appx. 339.

No. 04–6719. GRANT *v.* RIVERS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6722. GREEN *v.* GREENE, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–6725. PURANDA *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 919.

No. 04–6730. ENGLAND *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 04–6735. REED *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6739. GUTIERREZ *v.* DORSEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 229.

No. 04–6742. STRODER *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 630.

No. 04–6757. ROBERTS *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 04–6781. MACK *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 04–6784. SEVIER *v.* BROWN, ACTING WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 641.

No. 04–6788. MAVITY *v.* VENEMAN, SECRETARY OF AGRICULTURE. C. A. D. C. Cir. Certiorari denied.

No. 04–6791. CUONG VAN NGUYEN *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6803. GARCIA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6825. SMART *v.* CURRY, COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied.

No. 04–6832. PREVATT *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 866 So. 2d 729.

No. 04–6845. COLEMAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–6865. WARD *v.* HINSLEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 377 F. 3d 719.

No. 04–6883. CAMMUSE *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 667.

No. 04–6885. CHILDRESS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 781.

No. 04–6888. HOLMES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 376 F. 3d 270.

No. 04–6896. WADE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 341.

No. 04–6911. BURNS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6912. BURGEST *v.* WILEY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 362.

No. 04–6919. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 926.

No. 04–6924. ONOFRE DEJESUS, AKA TAPIA-OROZCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–6925. COOPER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 375 F. 3d 1041.

No. 04–6932. PEREZ-PEREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–6933. POSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 242.

No. 04–6937. HAMLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 249.

No. 04–6938. FOSTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 376 F. 3d 577.

No. 04–6941. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–6944. CONROD *v.* MORRISON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 04–6947. CABRERA-CASTILLO *v.* UNITED STATES (Reported below: 105 Fed. Appx. 636); LARA-HURTADO *v.* UNITED STATES (105 Fed. Appx. 622); MOLINERO-JIMENEZ, AKA JIMENEZ-MOLINERO *v.* UNITED STATES (105 Fed. Appx. 634); PEREZ-MARTINEZ *v.* UNITED STATES (105 Fed. Appx. 629); GARCIA RAMIREZ, AKA LOPEZ *v.* UNITED STATES (106 Fed. Appx. 922); RIVAS-CASTILLO *v.* UNITED STATES (105 Fed. Appx. 633); ZACARIAS-CARBAJAL *v.* UNITED STATES (105 Fed. Appx. 636); CHICO-AVILA *v.* UNITED STATES (108 Fed. Appx. 877); FARFAN-ALVAREZ *v.* UNITED STATES (105 Fed. Appx. 628); GARCIA-JARAMILLO *v.* UNITED STATES (105 Fed. Appx. 630); GONZALEZ-GUERRA *v.* UNITED STATES (105 Fed. Appx. 639); GRUVE-MARTINEZ *v.* UNITED STATES (104 Fed. Appx. 454); HERNANDEZ-REYES *v.* UNITED STATES (106 Fed. Appx. 919); VALENCIA-HUERTA *v.* UNITED STATES (108 Fed. Appx. 875); GOMEZ-SALINAS *v.* UNITED STATES (105 Fed. Appx. 623); HERNANDEZ-HERRERA *v.* UNITED STATES (105 Fed. Appx. 633); OLMEDO-PACHECO, AKA VELA-PACHECO *v.* UNITED STATES (105 Fed. Appx. 635); PENA-FLORES *v.* UNITED STATES (104 Fed. Appx. 456); REYES-HERNANDEZ *v.* UNITED STATES (104 Fed. Appx. 451); and LOPEZ-HERNANDEZ *v.* UNITED STATES (105 Fed. Appx. 630). C. A. 5th Cir. Certiorari denied.

No. 04–6953. BARRERA-CEREZO *v.* UNITED STATES (Reported below: 106 Fed. Appx. 920); DE LA FUENTE-GARZA *v.* UNITED STATES (105 Fed. Appx. 635); GODINEZ-RODRIGUEZ *v.* UNITED STATES (105 Fed. Appx. 635); MARTINEZ-HIDALGO *v.* UNITED STATES (104 Fed. Appx. 456); MARTINEZ-NATAREN *v.* UNITED STATES (108 Fed. Appx. 871); MORALES-RICO *v.* UNITED STATES (108 Fed. Appx. 872); PATINO-DE LA TORRE *v.* UNITED STATES (104 Fed. Appx. 453); VALDEZ-GUTIERREZ *v.* UNITED STATES (105

Fed. Appx. 634); ALANIS-SOTO *v.* UNITED STATES (105 Fed. Appx. 610); HERNANDEZ-CALDERON *v.* UNITED STATES (105 Fed. Appx. 640); LOZOYA-MAGANES *v.* UNITED STATES (105 Fed. Appx. 622); MALDONADO-OLIVARES *v.* UNITED STATES (105 Fed. Appx. 621); OLVERA-VITELA *v.* UNITED STATES (105 Fed. Appx. 639); RODRIGUEZ-MUNIZ *v.* UNITED STATES (108 Fed. Appx. 873); and ZUNIGA-VERAS *v.* UNITED STATES (108 Fed. Appx. 874). C. A. 5th Cir. Certiorari denied.

No. 04–6957. INSAULGARAT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 378 F. 3d 456.

No. 04–6961. MARSEILLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 377 F. 3d 1249.

No. 04–6962. MARTINEZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 369 F. 3d 1076.

No. 04–6963. KELLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 838.

No. 04–6967. MCKOY *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 98 Fed. Appx. 28.

No. 04–6968. MCGRATH *v.* HOOD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–6969. MOSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6972. LIRANZO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 385 F. 3d 66.

No. 04–6973. MCQUIDDY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–6976. JEFFERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 544.

No. 04–6979. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 377 F. 3d 715.

No. 04–6981. RONGHI *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 60 M. J. 83.

No. 04–6992. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 04–6997. CHAMBERS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 04–7005. SHUFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7006. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–7008. GRAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 175.

No. 04–7010. FEATHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 369 F. 3d 1035.

No. 04–7011. GRANBOIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 376 F. 3d 993.

No. 04–7012. HOWARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 116.

No. 04–7014. CINTRON-CARABALLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 356 F. 3d 1.

No. 04–7019. VEILLEUX *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–7025. COGDELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 875.

No. 04–7029. LEASURE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–7037. TROBAUGH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 922.

No. 04–7039. BUGGS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 649.

No. 04–7041. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 261.

No. 04–7043. DENIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 182.

No. 04–7048. SINGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 578.

No. 04–7057. ORTIZ-GUERRA, AKA QUIROZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 882.

No. 04–7059. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 640.

No. 04–7066. CHAPIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 135.

No. 04–7067. CLARK, AKA HENDRICKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 434.

No. 04–222. DASSAULT AVIATION *v.* ANDERSON. C. A. 8th Cir. Motion of Organization for International Investment et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 361 F. 3d 449.

No. 04–259. ILLINOIS *v.* MILLER. App. Ct. Ill., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 345 Ill. App. 3d 836, 803 N. E. 2d 610.

No. 04–476. UNIVERSITY OF ROCHESTER *v.* G. D. SEARLE & CO., INC., ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 358 F. 3d 916.

No. 04–6349. ADAMES *v.* MARTINEZ ET AL. C. A. 2d Cir. Certiorari before judgment denied.

Rehearing Denied

No. 03–1623. HAUGEN *v.* HENRY COUNTY, GEORGIA, ET AL., *ante*, p. 816;

No. 03–1645. IN RE GREEN, *ante*, p. 807;

No. 03–1718. KNUTH *v.* KNUTH, *ante*, p. 821;

No. 03–1721. VINTILLA *v.* CITY OF ROCKY RIVER, OHIO, ET AL., *ante*, p. 821;

No. 03–9785. KALINOWSKI *v.* BOND ET AL., 542 U. S. 907;

No. 03–10103. CORMIER *v.* TEXAS, *ante*, p. 825;

No. 03–10197. INGUAGGIATO *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY, *ante*, p. 827;

No. 03–10259. IN RE RUSSELL, *ante*, p. 807;

No. 03–10308. DAVIS *v.* WILSON, WARDEN, ET AL., *ante*, p. 830;

No. 03–10316. JONES *v.* MICHIGAN DEPARTMENT OF CORRECTIONS, *ante*, p. 830;

No. 03–10391. HENDERSON *v.* MCGRATH, WARDEN, *ante*, p. 833;

No. 03–10394. DUBOSE *v.* LADWIG ET AL., *ante*, p. 833;

No. 03–10441. RIVERA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 834;

No. 03–10503. SHISINDAY *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE ET AL., *ante*, p. 836;

No. 03–10547. DAVENPORT *v.* RENO AIR, INC., ET AL., *ante*, p. 838;

No. 03–10557. MURRAY *v.* LYNCH, ATTORNEY GENERAL OF RHODE ISLAND, ET AL., *ante*, p. 838;

No. 03–10621. SMITH *v.* MITCHELL, WARDEN, *ante*, p. 841;

No. 03–10630. STAFFNEY *v.* BERGHUIS, WARDEN, *ante*, p. 841;

No. 03–10645. JACKSON *v.* VIRGINIA, *ante*, p. 842;

No. 03–10650. BEARDSLEE *v.* BROWN, ACTING WARDEN, *ante*, p. 842;

No. 03–10679. MILLER *v.* SUPREME COURT OF MISSOURI, *ante*, p. 844;

No. 03–10718. ROSS *v.* TEXAS, *ante*, p. 846;

No. 03–10792. JEFFERSON, AKA MATHEW *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 851;

No. 03–10800. CAGE-BARILE *v.* BARILE, *ante*, p. 851;

No. 03–10826. MAYERS *v.* WHITE, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL., *ante*, p. 852;

No. 03–10843. MARTIN *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS, ET AL., *ante*, p. 853;

No. 03–10859. ALCORN *v.* UNITED STATES, *ante*, p. 854;

No. 03–10894. DAVIS *v.* ROBINSON, WARDEN, ET AL., *ante*, p. 856;

No. 03–10907. CARPENTER *v.* SMITH, WARDEN, *ante*, p. 857;

No. 03–10990. FINUCAN *v.* MARYLAND BOARD OF PHYSICIAN QUALITY ASSURANCE, *ante*, p. 862;

No. 03–10998. COVINGTON *v.* UNITED STATES, *ante*, p. 862;

No. 03–11032. TRIPLETT *v.* CAIN, WARDEN, *ante*, p. 864;

No. 03–11050. JONES *v.* FLORENCE COUNTY TAX ASSESSOR OFFICE, *ante*, p. 865;

No. 04–141. KING *v.* ENTERGY OPERATIONS, INC., ET AL., *ante*, p. 875;

No. 04–5037. CHEN *v.* APPLIED MATERIALS, INC., *ante*, p. 879;

No. 04–5078. MILES *v.* VIRGINIA, *ante*, p. 881;

No. 04–5170. EARLEY *v.* KEENAN, *ante*, p. 885;

No. 04–5205. ADKINS *v.* UNITED STATES, *ante*, p. 887;

No. 04–5227. RUSH *v.* UNITED STATES, *ante*, p. 888;

No. 04–5232. WILBURN *v.* EASTMAN KODAK ET AL., *ante*, p. 889;

No. 04–5252. CRAVER *v.* CAMPBELL & TAYLOR, *ante*, p. 890;

No. 04–5273. VETA *v.* ARIZONA, *ante*, p. 891;

No. 04–5321. OCHOA CANALES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 893;

No. 04–5329. BRIDGMAN *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 893;

No. 04–5334. REINHOLT *v.* REINHOLT, *ante*, p. 894;

No. 04–5354. MCBRIDE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 895;

No. 04–5384. ROBERTS *v.* UNIVERSITY OF PENNSYLVANIA ET AL., *ante*, p. 896;

No. 04–5408. BROWN *v.* HICKS, CLERK, SUPERIOR COURT OF GEORGIA, ATLANTA JUDICIAL CIRCUIT, ET AL., *ante*, p. 898;

No. 04–5424. LINDSEY *v.* FEDERAL BUREAU OF INVESTIGATION OFFICES ET AL., *ante*, p. 899;

No. 04–5496. ANDERSON *v.* SOWDERS, WARDEN, ET AL., *ante*, p. 903;

No. 04–5499. LAMPKIN *v.* UNITED STATES, *ante*, p. 903;

No. 04–5524. RING *v.* APPLETON ET AL., *ante*, p. 904;

No. 04–5526. THOMPSON *v.* TISCHLER ET AL., *ante*, p. 904;

No. 04–5530. K. E. *v.* FLORIDA BOARD OF BAR EXAMINERS, *ante*, p. 904;

No. 04–5558. BASALO *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 929;

No. 04–5579. CALHOUN, AKA MARTIN *v.* FRISCO RAILROAD ET AL., *ante*, p. 929;

No. 04–5604. KANIADAKIS *v.* UNITED STATES, *ante*, p. 907;

No. 04–5698. SIMON *v.* FEDERAL PRISON INDUSTRIES ET AL., *ante*, p. 910;

No. 04–5936. MICHAU *v.* TAYLOR, WARDEN, ET AL., *ante*, p. 914; and

No. 04–6179. WAGNER *v.* UNITED STATES, *ante*, p. 939. Petitions for rehearing denied.

No. 03–1633. IN RE HEMPHILL, *ante*, p. 808. Petition for rehearing denied. JUSTICE O'CONNOR and JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 03–6872. CASILLAS *v.* UNITED STATES, 540 U. S. 1025. Motion of petitioner for leave to file petition for rehearing denied.

DECEMBER 3, 2004

Dismissal Under Rule 46

No. 04–334. RAYTHEON CO. *v.* ASHBORN AGENCIES, LTD. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 372 F. 3d 451.

Certiorari Granted

No. 04–277. NATIONAL CABLE & TELECOMMUNICATIONS ASSN. ET AL. *v.* BRAND X INTERNET SERVICES ET AL.; and

No. 04–281. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* BRAND X INTERNET SERVICES ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 345 F. 3d 1120.

DECEMBER 6, 2004

Dismissal Under Rule 46

No. 04–6219. PAYNE *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 88 Fed. Appx. 281.

Certiorari Granted—Vacated and Remanded

No. 04–5891. SPENCER *v.* EARLEY ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tennessee* v. *Lane*, 541 U. S. 509 (2004). Reported below: 88 Fed. Appx. 599.

No. 04–6765. SILER *v.* OHIO. Ct. App. Ohio, Ashland County. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crawford* v. *Washington*, 541 U. S. 36 (2004).

Certiorari Granted—Reversed. (See No. 03–1669, *ante*, p. 77.)

Certiorari Dismissed

No. 04–6604. JONES *v.* BIRKETT, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–6638. SMITH *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. 04–702. HAMDAN *v.* RUMSFELD, SECRETARY OF DEFENSE. C. A. D. C. Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari before judgment denied.

No. 04–6711. OVIEDO *v.* MYERS, FKA OVIEDO. Super. Ct. Gwinnett County, Ga. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 27, 2004, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 04–7196. IN RE ROYALE. Petition for writ of habeas corpus denied.

No. 04–569. IN RE SHEMONSKY;
No. 04–572. IN RE SHEMONSKY; and

No. 04–610. IN RE GRAVES. Petitions for writs of mandamus denied.

No. 04–454. IN RE RODRIGUEZ-HAZBUN. Petition for writ of mandamus and/or prohibition denied.

No. 04–6579. IN RE BARKCLAY. Petition for writ of prohibition denied.

Certiorari Denied

No. 04–28. AKERS ET AL. *v.* MCGINNIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 352 F. 3d 1030.

No. 04–223. CHURCH OF THE AMERICAN KNIGHTS OF THE KU KLUX KLAN ET AL. *v.* KELLY, COMMISSIONER, NEW YORK CITY POLICE DEPARTMENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 356 F. 3d 197.

No. 04–296. HAGAN *v.* WARNER/ELEKTRA/ATLANTIC CORP. C. A. 6th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 264.

No. 04–300. BYNAM *v.* INTERMET MACHINING. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 882.

No. 04–306. VENTURE COAL SALES CO. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 370 F. 3d 1102.

No. 04–308. PRUITT ET AL. *v.* COMCAST CABLE HOLDINGS, LLC. C. A. 10th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 713.

No. 04–320. BOST ET AL. *v.* FEDERAL EXPRESS CORP. C. A. 11th Cir. Certiorari denied. Reported below: 372 F. 3d 1233.

No. 04–326. SWEENEY *v.* CARTER, ATTORNEY GENERAL OF INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 361 F. 3d 327.

No. 04–359. HABERERN *v.* SPRAGUE & SPRAGUE ET AL. Sup. Ct. Pa. Certiorari denied.

No. 04–440. STANLEY ET UX. *v.* CARPENTER, JUDGE, CIRCUIT COURT OF MICHIGAN, KENT COUNTY, ET AL. Ct. App. Mich. Certiorari denied.

No. 04–444. PICCIOTTO ET AL. *v.* GILLERAN ET AL. App. Ct. Mass. Certiorari denied. Reported below: 61 Mass. App. 1104, 807 N. E. 2d 862.

No. 04–447. CLISSURAS *v.* CONCORD VILLAGE OWNERS, INC., ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 3 N. Y. 3d 634, 816 N. E. 2d 192.

No. 04–452. CLINTON *v.* CITY OF ATLANTA, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 2.

No. 04–459. MATTMILLER *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 04–460. NATIONAL LEAGUE OF CITIES ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 345 F. 3d 1120.

No. 04–465. BENCHIMOL *v.* URRUTIA. Sup. Ct. Fla. Certiorari denied. Reported below: 874 So. 2d 1191.

No. 04–472. H&R BLOCK, INC., ET AL. *v.* MCNULTY ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 843 A. 2d 1267.

No. 04–475. ALBURQUERQUE-RIVERA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–481. ENEWALLY ET UX. *v.* WASHINGTON MUTUAL BANK. C. A. 9th Cir. Certiorari denied. Reported below: 368 F. 3d 1165.

No. 04–496. BRENEMAN ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 97 Fed. Appx. 329.

No. 04–502. VALLONE ET AL. *v.* CNA FINANCIAL CORP., AKA CNA CASUALTY OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 375 F. 3d 623.

No. 04–504. BRAKKEN *v.* HOYME. Sup. Ct. Wis. Certiorari denied. Reported below: 270 Wis. 2d 55, 677 N. W. 2d 233.

No. 04–511. REES *v.* CITY OF GLENDALE, CALIFORNIA, ET AL. App. Div., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 04–541. BLANSETT ET AL. *v.* CONTINENTAL AIRLINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 379 F. 3d 177.

No. 04–543. PHONOMETRICS, INC., ET AL. *v.* ITT SHERATON CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 106 Fed. Appx. 717.

No. 04–577. BALLARD *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–587. SAWUKAYTIS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 29.

No. 04–596. WILLIAMS-RUSSELL & JOHNSON, INC. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 371 F. 3d 1350.

No. 04–600. FARMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 370 F. 3d 435.

No. 04–606. CASTILLA *v.* UNITED STATES; and CALAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–616. CHOHUNG BANK *v.* FILLER, TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 378 F. 3d 213.

No. 04–619. WEIL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5878. PERRY *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL FACILITY. C. A. 8th Cir. Certiorari denied. Reported below: 356 F. 3d 880.

No. 04–5897. FITZGERALD *v.* FITZGERALD ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 5 App. Div. 3d 916, 772 N. Y. S. 2d 881.

No. 04–5908. SCOTT *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE. C. A. 3d Cir. Certiorari denied. Reported below: 100 Fed. Appx. 127.

No. 04–6185. PINEDA-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 453.

No. 04–6526. ROBINSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 874 So. 2d 66.

No. 04–6553. BOLTON *v.* KING, SUPERINTENDENT, SOUTH MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 04–6556. JONES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 358 N. C. 330, 595 S. E. 2d 124.

No. 04–6557. PRUITT *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–6561. PRUITT *v.* WILSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 281.

No. 04–6565. WILLIAMS *v.* SUPERIOR COURT OF CALIFORNIA, VENTURA COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–6566. DOUGLAS *v.* TRUE, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 04–6570. DEMATTEO *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD. C. A. 3d Cir. Certiorari denied.

No. 04–6571. LEPLEY *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 119 Nev. 827, 130 P. 3d 698.

No. 04–6583. GREEN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 119 Wash. App. 15, 79 P. 3d 460.

No. 04–6585. GONZALES *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6589. HOWARD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 877 So. 2d 136.

No. 04–6590. FRIDAY *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 568.

No. 04–6592. HALL *v.* MCCRAY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 1.

No. 04–6594. PERKINS *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 914.

No. 04–6596. HARRIS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6597. GREER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 879 So. 2d 621.

No. 04–6598. HOUGH *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6605. PRATT *v.* LFG. C. A. 7th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 571.

No. 04–6612. ASH *v.* ASH ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–6613. ANDERSON *v.* SIZER, COMMISSIONER, MARYLAND DIVISION OF CORRECTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 865.

No. 04–6614. BURTON *v.* CLEVELAND OHIO EMPOWERMENT ZONE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 461.

No. 04–6615. LEWIS *v.* GASPAR. C. A. 9th Cir. Certiorari denied.

No. 04–6616. MCDEID *v.* MOONEY, DIRECTOR OF THE MINNESOTA SEX OFFENDER PROGRAM; COKER *v.* MOONEY, DIRECTOR OF THE MINNESOTA SEX OFFENDER PROGRAM; JOHNSON *v.* MOONEY, DIRECTOR OF THE MINNESOTA SEX OFFENDER PROGRAM; POOLE *v.* MOONEY, DIRECTOR OF THE MINNESOTA SEX OFFENDER PROGRAM; SERNA *v.* MOONEY, DIRECTOR OF THE MINNESOTA SEX OFFENDER PROGRAM; RUBIN *v.* MOONEY, DIRECTOR OF THE MINNESOTA SEX OFFENDER PROGRAM; BENSON *v.* MOONEY, DIRECTOR OF THE MINNESOTA SEX OFFENDER PROGRAM; ROBB *v.* MOONEY, DIRECTOR OF THE MINNESOTA SEX OFFENDER PROGRAM; SABO *v.* MOONEY, DIRECTOR OF THE MINNESOTA SEX OFFENDER PROGRAM; WILSON *v.* MOONEY, DIRECTOR OF THE MINNESOTA SEX OFFENDER PROGRAM; and LEE *v.* MOONEY, DIRECTOR OF

THE MINNESOTA SEX OFFENDER PROGRAM. Ct. App. Minn. Certiorari denied.

No. 04–6618. MARTINI *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 348 F. 3d 360.

No. 04–6634. AMESBURY *v.* DEAN, SHERIFF, MARION COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 786.

No. 04–6635. JENKINS *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 82 Conn. App. 802, 847 A. 2d 1044.

No. 04–6641. STEELE *v.* RANDLE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6644. KLINGER *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW. C. A. 3d Cir. Certiorari denied.

No. 04–6648. BUIE *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–6656. WRIGHT *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 719.

No. 04–6659. TAYLOR *v.* YARBROUGH, SHERIFF, WALTON COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6662. DUNCAN *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 875.

No. 04–6663. COLLINS *v.* CITIBANK (SOUTH DAKOTA), N. A. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–6666. IN SOO CHUN *v.* KING COUNTY DEPARTMENT OF JUDICIAL ADMINISTRATION. Ct. App. Wash. Certiorari denied.

No. 04–6668. MOORE *v.* KELLY, SUPERINTENDENT, CENTRAL MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 04–6670. MCDONALD *v.* HOFBAUER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6671. N'KIMOTU *v.* SULLIVAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–6673. BRITT, GUARDIAN OF BRITT, A LEGALLY INCAPACITATED PERSON *v.* FOX ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 627.

No. 04–6675. COLEMAN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6676. COOPER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6677. CLAPSADL *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6685. HERNANDEZ *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6687. GARCIA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6689. FAWKES *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 781.

No. 04–6690. GRAY *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6692. IVES *v.* BOONE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 274.

No. 04–6695. SINGH *v.* MILLER, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 104 Fed. Appx. 770.

No. 04–6696. STEPHENS *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 04–6697. BLAIR *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6701. HARRISON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6702. HUMPHREY *v.* KIMBROOK MANOR APARTMENTS. Ct. App. N. Y. Certiorari denied. Reported below: 3 N. Y. 3d 700, 818 N. E. 2d 668.

No. 04–6703. HOWARD *v.* PERDUE, GOVERNOR OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6708. BANSAL *v.* LAMAR UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 590.

No. 04–6723. HOLLINGSWORTH *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6727. CAPPA *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 878.

No. 04–6733. LAMBERT *v.* MCBRIDE, SUPERINTENDENT, MAXIMUM CONTROL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 365 F. 3d 557.

No. 04–6736. BOSCAINO *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6752. DURAN *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 631.

No. 04–6756. JONES *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 359 F. 3d 1005.

No. 04–6777. LUCAS *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6808. WESTON *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6840. ANDERSON *v.* OHIO. Ct. App. Ohio, Washington County. Certiorari denied.

No. 04–6851. MARSHALL *v.* MEDICOMP, INC. Ct. App. Miss. Certiorari denied. Reported below: 878 So. 2d 193.

No. 04–6853. SPRINGFIELD *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 247.

No. 04–6907. HELTON *v.* MCADORY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 576.

No. 04–6916. GRAVES *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 220.

No. 04–6939. STOCKMEIER *v.* SANDOVAL, ATTORNEY GENERAL OF NEVADA. C. A. 9th Cir. Certiorari denied.

No. 04–6948. MARIN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–6982. STEWART *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 477.

No. 04–6990. TRAVERSO *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 156 Md. App. 759.

No. 04–6993. WILLIAMS *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Forsyth County, N. C. Certiorari denied.

No. 04–6994. CARTER *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7001. BELTON *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 150 N. H. 741, 846 A. 2d 526.

No. 04–7027. COLON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7052. GLASKER *v.* TRANSAMERICA FINANCIAL SERVICES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 389.

No. 04–7068. SERRATO-ESPINOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 723.

No. 04–7069. ROGERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 245.

No. 04–7070. RIOS-MACIAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 883.

No. 04–7071. ACUNA-CUADROS *v.* UNITED STATES; and CASTILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 385 F. 3d 875 (first judgment); 386 F. 3d 632 (second judgment).

No. 04–7076. MCCOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 355.

No. 04–7083. SOLOMON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 170.

No. 04–7086. DANIELS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 104 Fed. Appx. 740.

No. 04–7092. ROSS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–7098. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 789.

No. 04–7100. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 498.

No. 04–7101. TORRES, AKA SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 949.

No. 04–7105. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 815.

No. 04–7108. COLEMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–7109. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 506.

No. 04–7111. MUHAYMIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–7112. MARTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 378 F. 3d 353.

No. 04–7113. GRUBER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–7126. REED *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–7132. JIMENEZ-BORJA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 378 F. 3d 853.

No. 04–7141. RICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 112.

No. 04–7145. CIARAVELLA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 796.

No. 04–7149. LAWRENCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 463.

No. 04–7153. EDMONDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 416.

No. 04–7157. PULIDO-PEDROSA, AKA ARROLLO-NARANJO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 377 F. 3d 1124.

No. 04–7159. DOMINGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 594.

No. 04–7164. ADEOSHUN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–6470. ERICKSON *v.* SUNBEAM CORP. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 04–6633. COLIDA *v.* MOTOROLA, INC. C. A. 7th Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 107 Fed. Appx. 647.

Rehearing Denied

No. 03–10098. HAWTHORNE *v.* CAIN, WARDEN, *ante*, p. 825;

No. 03–10131. HOFFMAN *v.* JONES, WARDEN, *ante*, p. 825;

No. 03–10192. GREEN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 827;

No. 03–10285. REED *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, *ante*, p. 829;

No. 03–10301. JOHNSON *v.* WARD, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, *ante*, p. 830;

No. 03–10360. AUTREY *v.* PARSON, *ante*, p. 831;

No. 03–10806. CURRIE *v.* BLANKS, WARDEN, *ante*, p. 852;

No. 03–10870. LYNN *v.* ALLEN ET AL., *ante*, p. 855;

No. 03–10882. PEREA *v.* BUSH, PRESIDENT OF THE UNITED STATES, *ante*, p. 855;

No. 03–10939. ROMER *v.* CALIFORNIA ET AL. (two judgments), *ante*, p. 859;

No. 03–10954. KRONCKE *v.* TRUILLO, WARDEN, ET AL., *ante*, p. 860;

No. 03–10980. MUEHLBERG *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL., *ante*, p. 861;

No. 03–11013. ROMER *v.* YUBA COUNTY, CALIFORNIA, ET AL., *ante*, p. 863;

No. 04–5021. ALLEN *v.* MITCHELL, WARDEN, *ante*, p. 878;

No. 04–5057. HALE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 880;

No. 04–5237. UGOCHUKWU *v.* UNITED STATES, *ante*, p. 889;

No. 04–5325. MCCREARY *v.* JEFFERSON SMURFIT CORP., *ante*, p. 893;

No. 04–5380. WYNTER *v.* BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, *ante*, p. 896;

No. 04–5402. CURRIE *v.* BLANKS, WARDEN, *ante*, p. 897;

No. 04–5427. DEAN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 899;

No. 04–5554. THOMPSON *v.* NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., *ante*, p. 906;

No. 04–5580. CALHOUN, AKA MARTIN *v.* UNITED STATES, *ante*, p. 906;

No. 04–5587. BARNES *v.* CAIN, WARDEN, *ante*, p. 929;

No. 04–5605. BOYCE *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 907;

No. 04–5729. BEDARD *v.* IOWA, *ante*, p. 932;

No. 04–5780. GRAHAM *v.* WEBBER ET AL., *ante*, p. 911;

No. 04–5800. JACKSON *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 911;

No. 04–5902. IN RE OLSON, *ante*, p. 807;

No. 04–5912. JONES *v.* CITY OF ST. LOUIS, MISSOURI, *ante*, p. 946;

No. 04–6132. NOEM VETA *v.* DUPNIK, *ante*, p. 948;

No. 04–6243. GARDNER *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS, *ante*, p. 948; and

No. 04–6278. WILLIAMS *v.* UNITED STATES, *ante*, p. 939. Petitions for rehearing denied.

No. 03–9994. CORRADINI *v.* CORRADINI, 542 U. S. 941. Motion for leave to file petition for rehearing denied.

DECEMBER 10, 2004

Miscellaneous Order

No. 04A469. ASHCROFT, ATTORNEY GENERAL *v.* O CENTRO ESPIRITA BENEFICENTE UNIAO DO VEGETAL ET AL. C. A. 10th Cir. Application for stay of injunction or, in the alternative, to recall and stay the mandate, presented to JUSTICE BREYER, and by him referred to the Court, denied. The temporary stay entered December 1, 2004, is vacated.

Certiorari Granted

No. 04–340. SAN REMO HOTEL, L. P., ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 364 F. 3d 1088.

No. 04–480. METRO-GOLDWYN-MAYER STUDIOS INC. ET AL. *v.* GROKSTER, LTD., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 380 F. 3d 1154.

No. 04–495. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. *v.* AUSTIN ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 372 F. 3d 346.

No. 04–5928. MEDELLIN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 371 F. 3d 270.

DECEMBER 13, 2004

Certiorari Granted—Vacated and Remanded

No. 03–1622. FOUBERT *v.* LYONS. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Brosseau* v. *Haugen*, *ante*, p. 194 *(per curiam)*. Reported below: 90 Fed. Appx. 835.

Certiorari Granted—Reversed and Remanded. (See No. 03–1261, *ante*, p. 194.)

Miscellaneous Orders

No. 04A305. KRONCKE *v.* HOOD ET AL.; and

No. 04A306. KRONCKE *v.* HOOD ET AL. Applications for certificates of appealability, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. 04A449. PPG INDUSTRIES, INC. *v.* NELSON, DBA JAMESTON GLASS SERVICE, ET AL. C. A. 3d Cir. Application to recall and stay the mandate, addressed to JUSTICE BREYER and referred to the Court, denied.

No. 04M29. CONYER *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 03–388. BATES ET AL. *v.* DOW AGROSCIENCES LLC. C. A. 5th Cir. [Certiorari granted, 542 U. S. 936.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–932. DURA PHARMACEUTICALS, INC., ET AL. *v.* BROUDO ET AL. C. A. 9th Cir. [Certiorari granted, 542 U. S. 936.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–1601. CITY OF RANCHO PALOS VERDES, CALIFORNIA, ET AL. *v.* ABRAMS. C. A. 9th Cir. [Certiorari granted, 542 U. S. 965.] Motion of petitioners to dispense with printing the joint appendix granted. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–5695. COOPER *v.* LOCK, SUPERINTENDENT, CENTRAL MISSOURI CORRECTIONAL CENTER. Sup. Ct. Mo. Motion of

petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 921] denied.

No. 04–6715. HALL *v.* MILLER. Sup. Ct. Ky.; and

No. 04–6768. FAN *v.* NAG ET AL. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until January 3, 2005, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 04–7307. IN RE CAJA FONESCA. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 03–10858. BROOMES ET AL. *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 358 F. 3d 1251.

No. 04–173. QUINN ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 744.

No. 04–190. PETRO-HUNT, L. L. C., ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 365 F. 3d 385.

No. 04–198. R. J. FITZGERALD & CO., INC., ET AL. *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 310 F. 3d 1321.

No. 04–206. SL SERVICE, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 357 F. 3d 1358.

No. 04–482. DILLARD'S, INC. *v.* BYRD. C. A. 11th Cir. Certiorari denied. Reported below: 368 F. 3d 1278.

No. 04–483. HUNTER *v.* PORTER. App. Ct. Mass. Certiorari denied. Reported below: 57 Mass. App. 233, 782 N. E. 2d 530.

No. 04–486. LAPIDES *v.* NATIONAL CITY BANK OF MINNEAPOLIS. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 910.

No. 04–490. PARKER *v.* MCLAURIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 801.

No. 04–494. OVERMAN *v.* TAYLOR. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 185.

No. 04–500. LEVIN *v.* UPPER MAKEFIELD TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 90 Fed. Appx. 653.

No. 04–505. CONROY *v.* ABRAHAM CHEVROLET-TAMPA, INC., DBA AUTOWAY CHEVROLET. C. A. 11th Cir. Certiorari denied. Reported below: 375 F. 3d 1228.

No. 04–509. SANCHEZ ET AL. *v.* BERNALILLO COUNTY BOARD OF COUNTY COMMISSIONERS. Dist. Ct. N. M., Bernalillo County. Certiorari denied.

No. 04–520. PALAHUTA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 580.

No. 04–622. NEGELE *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 368 F. 3d 981.

No. 04–638. ZAVALIDROGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 721.

No. 04–646. BIERNAT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 369 F. 3d 1046.

No. 04–5606. SKINNER *v.* SAN FELIPE DEL RIO CONSOLIDATED INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 717.

No. 04–5708. CEDANO-MEDINA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 366 F. 3d 682.

No. 04–5794. GOLDSTEIN *v.* HARVARD UNIVERSITY. C. A. 1st Cir. Certiorari denied. Reported below: 77 Fed. Appx. 534.

No. 04–6717. GOODRIDGE *v.* LEWIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–6731. SCOTT *v.* WACKENHUT CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 443.

No. 04–6732. SIXTA *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 04–6738. PARTIN *v.* ROBINSON, TRANSFER CASE WORKER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 04–6743. STONEMAN *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 567.

No. 04–6749. STINSON *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 04–6750. SHABAZZ *v.* MATESANZ. C. A. 1st Cir. Certiorari denied.

No. 04–6761. MOORE *v.* FORTNER, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6762. MCCOOL *v.* PAPPERT, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6763. BRYANT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6764. BELCHER *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 04–6771. WALTER *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6775. BENSON *v.* HOME DEPOT U. S. A., INC. C. A. 5th Cir. Certiorari denied.

No. 04–6780. LUMUMBA *v.* PATRICK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6795. HARRIS *v.* FLORIDA; and
No. 04–6796. GENTES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 881 So. 2d 1079.

No. 04–6821. COCKRELL *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 04–6857. PAGE *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 767.

No. 04–6901. STONE *v.* CRAWFORD, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 662.

No. 04–6983. SIMBA *v.* THOMPSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 967.

No. 04–6986. BREWER *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 378 F. 3d 952.

No. 04–7004. WILSON *v.* SNODGRASS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–7026. COOLEY *v.* WATKINS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 861.

No. 04–7028. DORENBOS *v.* GORMAN, SUPERINTENDENT, LARCH CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 04–7102. WILLIAMS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 207.

No. 04–7107. MARLOW *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 275 Wis. 2d 277, 683 N. W. 2d 94.

No. 04–7123. CARR *v.* SCHOFIELD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 364 F. 3d 1246.

No. 04–7155. EVANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 780.

No. 04–7169. FRAMPTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 382 F. 3d 213.

No. 04–7170. HERVEY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 278 Kan. —, 91 P. 3d 1238.

No. 04–7178. RAMIREZ-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 561.

No. 04–7180. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 986.

No. 04–7181. GONZALEZ-VALENZUELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–7185. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–7187. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–7188. SHERRILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 82.

No. 04–7195. SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 133.

No. 04–7204. MCLAUGHLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 556.

No. 04–7209. KATO *v.* GRABER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–7211. SANDOVAL-RIVAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 854.

No. 04–7219. PATINO, AKA PATINO-REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 455.

No. 04–7222. LUGAN-BALLEZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 632.

No. 04–7228. MISLA-MARTINEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–1452. MUELLER, WARDEN *v.* NUNES. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 350 F. 3d 1045.

No. 04–162. MADDOX, WARDEN *v.* TAYLOR. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 366 F. 3d 992.

No. 04–180. BURLESON *v.* HANCOCK COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION ET AL. Ct. App. Miss.

Motion of North Carolina et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 872 So. 2d 43.

No. 04–618. SILVERSTEIN *v.* PENGUIN PUTNAM, INC. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 368 F. 3d 77.

No. 04–7271. KUNKLE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

JUSTICE STEVENS, concurring.

In a state postconviction proceeding on November 17, 2004, the Texas Court of Criminal Appeals, by a 5-to-4 vote, entered a two-paragraph order denying petitioner Troy Kunkle's claim that his execution should be set aside because the proceedings that resulted in his death sentence violated the Eighth Amendment under *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), and *Tennard* v. *Dretke*, 542 U. S. 274 (2004). Promptly after the Texas court entered its order, and only hours before his execution was scheduled, petitioner applied to this Court for a stay, which we granted. That was the second time this Court had stayed petitioner's scheduled execution. Because I recognize that granting a stay of execution is not without costs, I write to explain why I felt compelled to vote to grant it, and why I must now vote to deny petitioner's writ of certiorari.

Given the order entered by the Texas court, we had reason to doubt whether the court's decision was in fact based on adequate and independent state grounds. The court, for example, stated in its brief order that it had "reviewed [petitioner's] claims in light of *Tennard* v. *Dretke* and *Smith* v. *Texas*." *Ex parte Kunkle*, No. WR–20,574–04, p. 2. If the court's decision had indeed been a ruling on the merits of Kunkle's federal claim, it was inconsistent with our decisions in *Penry*, *Tennard*, and more recently *Smith* v. *Texas*, *ante*, p. 37 *(per curiam)*, and we would have had jurisdiction to review and reverse the order. If, on the other hand, the order was independently based on the state procedural ground that the Texas court itself had no authority to grant the relief requested, we lack jurisdiction. *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945). It is beyond dispute, however, that we had jurisdiction to enter a stay in order to give us time to determine

whether we have jurisdiction to reach the merits of Kunkle's federal claim.

I am now satisfied that the Texas court's determination was independently based on a determination of state law, see Tex. Code Crim. Proc. Ann., Art. 11.071, § 5 (Vernon Supp. 2004–2005), and therefore that we cannot grant petitioner his requested relief. That result is regrettable because it seems plain that Kunkle's sentence was imposed in violation of the Constitution. In this proceeding, however, he has invoked a state remedy that, as a matter of state law, is not available to him. Accordingly, I concur in the Court's decision.

Rehearing Denied

No. 03–10876. MINEFIELD *v.* UNITED STATES, *ante*, p. 855;

No. 03–11047. EDISON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 865;

No. 04–5082. COLES *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 881;

No. 04–5206. LANDAU *v.* VASTINE-SMITH ET AL., *ante*, p. 887;

No. 04–5403. CLEMENTS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 897;

No. 04–5409. CARTER *v.* UNITED STATES, *ante*, p. 898;

No. 04–5461. IRIZARRY SANABRIA *v.* UNITED STATES, *ante*, p. 901;

No. 04–5640. SMITH *v.* *NSYNC ET AL., *ante*, p. 908;

No. 04–5753. COCHRAN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 933;

No. 04–5766. CANNON *v.* DEPARTMENT OF JUSTICE ET AL., *ante*, p. 911;

No. 04–5806. TAALIB-DIN *v.* CITY OF DETROIT, MICHIGAN, ET AL., *ante*, p. 934;

No. 04–5838. VAUGHAN *v.* VAUGHAN ET AL., *ante*, p. 945;

No. 04–5847. JONES *v.* SHANNON VILLAS CONDOMINIUM ASSN., *ante*, p. 935;

No. 04–5880. LONGLEY *v.* UNITED STATES, *ante*, p. 913; and

No. 04–5893. VAUGHAN *v.* PUTNAM COUNTY, FLORIDA, ET AL., *ante*, p. 946. Petitions for rehearing denied.

DECEMBER 30, 2004

Dismissal Under Rule 46

No. 03–1571. HACIENDA VALLEY MOBILE ESTATES *v.* CITY OF MORGAN HILL, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 353 F. 3d 651.

JANUARY 3, 2005

Dismissal Under Rule 46

No. 04–651. MILLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF MILLER, ET AL. *v.* HONEYWELL INTERNATIONAL INC. ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 107 Fed. Appx. 643.

JANUARY 5, 2005

Dismissal Under Rule 46

No. 03–1681. CITY OF MORGAN HILL, CALIFORNIA, ET AL. *v.* HACIENDA VALLEY MOBILE ESTATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 353 F. 3d 651.

JANUARY 7, 2005

Miscellaneous Orders

No. 03–388. BATES ET AL. *v.* DOW AGROSCIENCES LLC. C. A. 5th Cir. [Certiorari granted, 542 U. S. 936.] Motion of Texas et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 04–37. CLINGMAN, SECRETARY, OKLAHOMA STATE ELECTION BOARD, ET AL. *v.* BEAVER ET AL. C. A. 10th Cir. [Certiorari granted, 542 U. S. 965.] Motion of South Dakota et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted.

Certiorari Granted

No. 03–1237. MERCK KGAA *v.* INTEGRA LIFESCIENCES I, LTD., ET AL. C. A. Fed. Cir. Motion of Eli Lilly and Company for leave to file a brief as *amicus curiae* granted. Certiorari granted. JUSTICE O'CONNOR and JUSTICE BREYER took no part

in the consideration or decision of this motion and this petition. Reported below: 331 F. 3d 860.

No. 03–10198. HALBERT *v.* MICHIGAN. Ct. App. Mich. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

No. 04–169. GRAHAM COUNTY SOIL AND WATER CONSERVATION DISTRICT ET AL. *v.* UNITED STATES EX REL. WILSON. C. A. 4th Cir. Certiorari granted. Reported below: 367 F. 3d 245.

No. 04–368. ARTHUR ANDERSEN LLP *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 374 F. 3d 281.

No. 04–514. BELL, WARDEN *v.* THOMPSON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 2 presented by the petition. Reported below: 373 F. 3d 688.

No. 04–563. MAYLE, WARDEN *v.* FELIX. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 379 F. 3d 612.

No. 04–603. GRABLE & SONS METAL PRODUCTS, INC. *v.* DARUE ENGINEERING & MANUFACTURING. C. A. 6th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 377 F. 3d 592.

No. 04–637. MITCHELL, WARDEN *v.* STUMPF. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 367 F. 3d 594.

No. 04–6964. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

JANUARY 10, 2005

Dismissal Under Rule 46

No. 04–5586. PEOPLES *v.* UNITED STATES. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 360 F. 3d 892.

Certiorari Granted—Vacated and Remanded

No. 04–273. OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS *v.* NANCE. Sup. Ct. S. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida* v. *Nixon*, *ante*, p. 175. Reported below: 358 S. C. 480, 596 S. E. 2d 62.

Certiorari Dismissed

No. 04–6805. TASBY, AKA AMEN-RA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–6810. WELLS *v.* SCACE ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–6875. REED *v.* ARIZONA. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–6935. JOHNSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–6987. PEARSON *v.* SAAR, SECRETARY, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 100 Fed. Appx. 952.

No. 04–7061. PELLEGRINO *v.* JANKLOW, GOVERNOR OF SOUTH DAKOTA, ET AL. C. A. 8th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid

and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 90 Fed. Appx. 190.

No. 04–7249. REED *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–7302. HOOD *v.* BECK ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 108 Fed. Appx. 785.

No. 04–7314. OKORO *v.* HEMINGWAY, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 104 Fed. Appx. 558.

No. 04–7399. MCCONICO *v.* CITY OF BIRMINGHAM, ALABAMA, ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 116 Fed. Appx. 244.

No. 04–7402. REED *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2387. IN RE DISCIPLINE OF IFILL. Adrian Palmer Ifill, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2388. IN RE DISCIPLINE OF CULVER. Allan James Culver, Jr., of Bel Air, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2389. IN RE DISCIPLINE OF FITZGERALD. Judith Lenore Fitzgerald, of Baltimore, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2390. IN RE DISCIPLINE OF WOOD. Benjamin Churchill Wood, of Suffern, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2391. IN RE DISCIPLINE OF YOUNG. George Guyer Young III, of Havertown, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2392. IN RE DISCIPLINE OF WEBBER. Joseph Philip Webber, of Towson, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2393. IN RE DISCIPLINE OF FRANKEL. Mark David Frankel, of York, Pa., is suspended from the practice of law in

this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2394. IN RE DISCIPLINE OF GOODMAN. Ellis Howard Goodman, of Baltimore, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 04M30. ZENIAN *v.* DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION;

No. 04M31. YOUNG *v.* S. E. JOHNSON COS., INC.;

No. 04M32. COLEN *v.* LOS ANGELES COUNTY BOARD OF SUPERVISORS ET AL.;

No. 04M33. DELUCA *v.* UNITED STATES;

No. 04M34. DORROUGH *v.* UNITED STATES;

No. 04M36. NISEWARNER *v.* UNITED STATES;

No. 04M37. SIBLEY *v.* SIXTH RMA PARTNERS, L. P., AKA RMA PARTNERS, L. P.; and

No. 04M38. PANEZO *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 04M35. ROSS *v.* CONNECTICUT. Motion to defer consideration denied. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 105, Orig. KANSAS *v.* COLORADO. Motion of the Special Master for interim fees and expenses granted, and the Special Master is awarded a total of $10,060.80 for the period January 26 through November 16, 2004, to be paid equally by the parties. [For earlier decision herein, see, *e. g.*, *ante*, p. 86.]

No. 02–1672. JACKSON *v.* BIRMINGHAM BOARD OF EDUCATION. C. A. 11th Cir. [Certiorari granted, 542 U. S. 903.] Motion of respondent for leave to file a supplemental brief after argument denied.

No. 03–1693. MCCREARY COUNTY, KENTUCKY, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 924.] Motion of the Acting

Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–70. EXXON MOBIL CORP. *v.* ALLAPATTAH SERVICES, INC., ET AL. C. A. 11th Cir.; and

No. 04–79. DEL ROSARIO ORTEGA ET AL. *v.* STAR-KIST FOODS, INC. C. A. 1st Cir. [Certiorari granted, *ante*, p. 924.] Motion for divided argument granted to be divided as follows: 22 minutes for petitioner in No. 04–70; 22 minutes for respondent in No. 04–79; 22 minutes for respondents in No. 04–70; and 22 minutes for petitioners in No. 04–79. Request to argue the cases *seriatim* denied.

No. 04–278. TOWN OF CASTLE ROCK, COLORADO *v.* GONZALES, INDIVIDUALLY AND AS NEXT BEST FRIEND OF HER DECEASED MINOR CHILDREN, GONZALES ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 955.] Motion of the parties to dispense with printing the joint appendix granted.

No. 04–403. HABERMAN *v.* CITY OF LONG BEACH, NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of respondents for sanctions denied.

No. 04–575. NIELSON, EXECUTIVE DIRECTOR, UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, ET AL. *v.* PRIVATE FUEL STORAGE, L. L. C., ET AL. C. A. 10th Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 04–828. EVANS ET AL. *v.* STEPHENS ET AL. C. A. 11th Cir. Motion of petitioners to expedite consideration of petition for writ of certiorari denied.

No. 04–5318. CARTER *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 804] denied.

No. 04–5426. CLARK *v.* UNITED STATES DISTRICT COURTS FOR THE CENTRAL AND NORTHERN DISTRICTS OF CALIFORNIA. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 804] denied.

No. 04–6290. LEVY *v.* FAIRFAX COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Motion of petitioner for reconsideration of order

denying leave to proceed *in forma pauperis* [*ante*, p. 985] denied.

No. 04–7036. VENTIMIGLIA *v.* ST. LOUIS COUNTY, MISSOURI, ET AL. C. A. 8th Cir.;

No. 04–7056. MURESAN *v.* WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES. Ct. App. Wash.;

No. 04–7117. AFFUL *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 1st Cir.;

No. 04–7160. IN RE BLEDSOE; and

No. 04–7296. RUIZ RIVERA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until January 31, 2005, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 04–7432. IN RE DOOSE;

No. 04–7456. IN RE BAKER;

No. 04–7551. IN RE ROBINSON, AKA YOWEL;

No. 04–7581. IN RE FIGUEROA;

No. 04–7607. IN RE BROWN;

No. 04–7673. IN RE BROOKS; and

No. 04–7707. IN RE STREETER. Petitions for writs of habeas corpus denied.

No. 04–586. IN RE SHEMONSKY;

No. 04–782. IN RE SHEMONSKY;

No. 04–783. IN RE SHEMONSKY;

No. 04–6951. IN RE MURRAY;

No. 04–7003. IN RE VOVAK;

No. 04–7038. IN RE THIBEAUX;

No. 04–7163. IN RE BARKCLAY; and

No. 04–7200. IN RE BARKCLAY. Petitions for writs of mandamus denied.

No. 04–613. IN RE JARMUTH;

No. 04–6856. IN RE BARKCLAY;

No. 04–6917. IN RE MEASE;

No. 04–6918. IN RE BARKCLAY;

No. 04–6954. IN RE BARKCLAY;

No. 04–7023. IN RE BARKCLAY;

No. 04–7024. IN RE BARKCLAY; and

No. 04–7300. IN RE VOVAK. Petitions for writs of prohibition denied.

Certiorari Denied

No. 04–120. PARKER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 873 So. 2d 270.

No. 04–126. ILLINOIS *v.* BRAGGS. Sup. Ct. Ill. Certiorari denied. Reported below: 209 Ill. 2d 492, 810 N. E. 2d 472.

No. 04–256. ASIKA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 362 F. 3d 264.

No. 04–301. OFFICE OF THE COMMISSIONER OF BASEBALL ET AL. *v.* MAJOR LEAGUE UMPIRES ASSN. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 357 F. 3d 272.

No. 04–318. POOLE *v.* FAMILY COURT OF NEW CASTLE COUNTY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 368 F. 3d 263.

No. 04–356. EGERVARY *v.* YOUNG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 366 F. 3d 238.

No. 04–381. SHEN *v.* T. D. WATERHOUSE INVESTOR SERVICE, INC. C. A. 1st Cir. Certiorari denied.

No. 04–389. MAYNARD *v.* NYGREN, SHERIFF, MCHENRY COUNTY, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 372 F. 3d 890.

No. 04–392. PALCKO *v.* AIRBORNE EXPRESS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 372 F. 3d 588.

No. 04–397. FORMER EMPLOYEES OF MARATHON ASHLAND PIPE LINE, LLC *v.* CHAO, SECRETARY OF LABOR. C. A. Fed. Cir. Certiorari denied. Reported below: 370 F. 3d 1375.

No. 04–398. GLUKOWSKY *v.* EQUITY ONE, INC. Sup. Ct. N. J. Certiorari denied. Reported below: 180 N. J. 49, 848 A. 2d 747.

No. 04–405. HUDSON *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE. Ct. App. Tenn. Certiorari denied. Reported below: 148 S. W. 3d 907.

No. 04–423. CHINA NORTH INDUSTRIES CORP., A CHINESE ENTITY, AKA NORINCO *v.* ILETO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 349 F. 3d 1191.

No. 04–430. LIFESTAR AMBULANCE SERVICE, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 365 F. 3d 1293.

No. 04–449. LAMONT *v.* O'DONNELL ET VIR. Sup. Ct. Ore. Certiorari denied. Reported below: 337 Ore. 86, 91 P. 3d 721.

No. 04–468. AG INDUSTRIAL MANUFACTURING INC. ET AL. *v.* WATERKEEPERS NORTHERN CALIFORNIA, DBA DELTAKEEPER, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 375 F. 3d 913.

No. 04–477. CHIRON CORP. *v.* GENENTECH, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 363 F. 3d 1247.

No. 04–479. ARMSTRONG *v.* SEGAL, AS TRUSTEE OF MOUNTAIN PACIFIC VENTURES, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 285.

No. 04–487. VISNIC ET AL. *v.* NORTEL NETWORKS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 369 F. 3d 27.

No. 04–492. CORRIGAN *v.* WASHINGTON. Super. Ct. Wash., Adams County. Certiorari denied.

No. 04–498. JACOBS *v.* LAWLER ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 04–501. HEADSPETH *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 265 Ga. App. 288, 593 S. E. 2d 742.

No. 04–506. CLEVINGER ET AL. *v.* DIVERSIFIED TELECOM SERVICE, INC. Sup. Ct. Neb. Certiorari denied. Reported below: 268 Neb. 388, 683 N. W. 2d 338.

No. 04–508. BURTON *v.* BUCKNER CHILDREN & FAMILY SERVICES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 394.

No. 04–516. DONALDSON ET AL. *v.* LOTT, SHERIFF, RICHLAND COUNTY, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 372 F. 3d 267.

No. 04–518. H&R BLOCK, INC., ET AL. *v.* CARNEGIE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED. C. A. 7th Cir. Certiorari denied. Reported below: 376 F. 3d 656.

No. 04–519. BIRNBAUM *v.* LAW OFFICES OF G. DAVID WESTFALL, P. C., ET AL. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 120 S. W. 3d 470.

No. 04–521. OBER *v.* BROWN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 105 Fed. Appx. 345.

No. 04–523. WYSS, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF WYSS *v.* CITY OF HOQUIAM, WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 449.

No. 04–524. TRACY *v.* TRACY, AKA COCKFIELD, ET AL. Sup. Ct. Pa. Certiorari denied.

No. 04–525. LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 367 F. 3d 650.

No. 04–526. HUGHES ET AL. *v.* CRIST, ATTORNEY GENERAL OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 377 F. 3d 1258.

No. 04–528. WOMACK+HAMPTON ARCHITECTS, L. L. C. *v.* METRIC HOLDINGS LIMITED PARTNERSHIP ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 374.

No. 04–535. GONZALEZ-HERNANDEZ ET AL. *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 345.

No. 04–538. DAVIS *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 878 So. 2d 1020.

No. 04–545. HERNANDEZ-ANGELES *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 148.

No. 04–547. TRUNNELL *v.* SUMMIT COUNTY, UTAH, ET AL. Ct. App. Utah. Certiorari denied.

No. 04–549. EDEM *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 04–550. NADER ET AL. *v.* SERODY ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 580 Pa. 134, 860 A. 2d 1.

No. 04–551. ALBRIGHT *v.* NEIGHBORHOOD DEVELOPMENT COLLABORATIVE; and

No. 04–552. GINSBERG *v.* NEIGHBORHOOD DEVELOPMENT COLLABORATIVE. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 811.

No. 04–553. SIERRA *v.* FLORIDA DEPARTMENT OF TRANSPORTATION. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 875 So. 2d 620.

No. 04–558. SIMEONOV *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 371 F. 3d 532.

No. 04–560. BLAUSTEIN & REICH, INC., DBA BOB'S GUN & TACKLE SHOP *v.* TRUSCOTT, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES. C. A. 4th Cir. Certiorari denied. Reported below: 365 F. 3d 281.

No. 04–562. SKONIECZNY *v.* ECONOMY BOROUGH MUNICIPAL AUTHORITY. Commw. Ct. Pa. Certiorari denied. Reported below: 834 A. 2d 685.

No. 04–564. CASS *v.* SUFFOLK COUNTY CORRECTIONAL FACILITY ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–565. EDWARDS *v.* BARTON PROTECTIVE SERVICES, INC., ET AL. Ct. App. D. C. Certiorari denied. Reported below: 859 A. 2d 1110.

No. 04–566. WALTERS *v.* DAUGHTERS OF CHARITY NATIONAL HEALTH SYSTEM, INC., DBA PROVIDENCE HOSPITAL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 3.

No. 04–567. TALMIDGE INTERNATIONAL, LTD., ET AL. *v.* DAHIYA. C. A. 5th Cir. Certiorari denied. Reported below: 371 F. 3d 207.

No. 04–573. CHESAPEAKE BAY FISHING CO., L. C. *v.* GOLDEN NUGGET, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 530.

No. 04–578. SERRATO *v.* KAPLAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 509.

No. 04–580. SORENSON *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 98 Fed. Appx. 905.

No. 04–583. MACDONALD LETTER SERVICE, INC. *v.* MARSHALL, SECRETARY OF THE IOWA SENATE, ET AL. Ct. App. Iowa. Certiorari denied. Reported below: 683 N. W. 2d 126.

No. 04–584. KONDAKOVA ET AL. *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 383 F. 3d 792.

No. 04–588. OLIVER *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 107 Fed. Appx. 899.

No. 04–601. SHAFER *v.* MILLER-STOUT, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 626.

No. 04–604. CITY OF TUCSON, ARIZONA, ET AL. *v.* MCCULLEY. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 21.

No. 04–608. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 368 F. 3d 1102.

No. 04–612. AMARANENI, ADMINISTRATOR OF THE ESTATE OF VENKATARAMIAH, ET AL. *v.* GULF COAST RESEARCH LABORATORY ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 877 So. 2d 1250.

No. 04–614. KELLY *v.* ORANGE COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 206.

No. 04–615. KAPLAN *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 74.

No. 04–625. HAAS *v.* WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 107.

No. 04–627. MARTINEZ *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 379 F. 3d 1034 and 100 Fed. Appx. 702.

No. 04–628. JAFFEE *v.* GOODWIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 784.

No. 04–629. RAHN, DIRECTOR, MISSOURI DEPARTMENT OF TRANSPORTATION, ET AL. *v.* ROBB ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 370 F. 3d 735.

No. 04–630. RULLAN, SECRETARY, PUERTO RICO DEPARTMENT OF HEALTH, ET AL. *v.* MORALES FELICIANO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 378 F. 3d 42.

No. 04–632. KUAMOO ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 137.

No. 04–633. PRATT *v.* NELSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 836.

No. 04–634. PEABODY COAL CO. ET AL. *v.* NAVAJO NATION. C. A. 9th Cir. Certiorari denied. Reported below: 373 F. 3d 945.

No. 04–635. GABANSKI *v.* MACLEAN ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 04–636. FRIENDS OF FALUN GONG ET AL. *v.* PACIFIC CULTURE ENTERPRISE, INC., DBA CHINA PRESS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 109 Fed. Appx. 442.

No. 04–639. ZEIDAN *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied.

No. 04–640. 1690 COBB L. L. C., DBA WATERPIPE WORLD, ET AL. *v.* CITY OF MARIETTA, GEORGIA, ET AL. Super. Ct. Cobb County, Ga. Certiorari denied.

No. 04–642. DIPPIN' DOTS, INC. *v.* FROSTY BITES DISTRIBUTION, LLC. C. A. 11th Cir. Certiorari denied. Reported below: 369 F. 3d 1197.

No. 04–643. BARNES *v.* ROZMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 107 Fed. Appx. 273.

No. 04–644. BROOKS *v.* KINGSTON, ACTING WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 380 F. 3d 1009.

No. 04–648. RHINEHART *v.* UTAH. 1st Jud. Dist. Ct., Cache County, Utah. Certiorari denied.

No. 04–653. CULWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 426.

No. 04–654. MCDONALD, EXECUTRIX OF THE ESTATE OF ROGER *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–656. JUN ZHANG *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 361.

No. 04–662. ZAMACONA-ESCALERA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–664. LOOP CORP. ET AL. *v.* UNITED STATES TRUSTEE. C. A. 8th Cir. Certiorari denied. Reported below: 379 F. 3d 511.

No. 04–669. NICHOLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 376 F. 3d 440.

No. 04–671. VANGUILDER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 04–673. MOODY NATIONAL BANK OF GALVESTON *v.* GE LIFE & ANNUITY ASSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 383 F. 3d 249.

No. 04–678. GOODMAN *v.* BOWDOIN COLLEGE. C. A. 1st Cir. Certiorari denied. Reported below: 380 F. 3d 33.

No. 04–680. JACKSON ET AL. *v.* RAY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 893.

No. 04–683. BARBEE ET AL. *v.* COLONIAL HEALTHCARE CENTER, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–685. TRAFICANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 368 F. 3d 646.

No. 04–700. TRAUM *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 60 M. J. 226.

No. 04–706. ANCONA *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 270 Conn. 568, 854 A. 2d 718.

No. 04–707. BOWMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 380 F. 3d 387.

No. 04–709. SIFRIT *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 383 Md. 77, 857 A. 2d 65.

No. 04–725. SIMMONS *v.* KMART CORP. C. A. 7th Cir. Certiorari denied. Reported below: 381 F. 3d 709.

No. 04–733. GRAVES *v.* SCHROEDER, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, ET AL.; and GRAVES *v.* FEESS ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–738. CALLAN *v.* BUSH, PRESIDENT OF THE UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 68.

No. 04–756. ANDERSON ET AL. *v.* INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 370 F. 3d 542.

No. 04–767. MOORE *v.* TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES. Ct. App. Tenn. Certiorari denied.

No. 04–5160. GROSS *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 852 So. 2d 1.

No. 04–5161. GROSS *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 852 So. 2d 1.

No. 04–5333. TOWNSELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 209 Ill. 2d 543, 809 N. E. 2d 103.

No. 04–5463. AWADALLAH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 349 F. 3d 42.

No. 04–5578. CORUM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 362 F. 3d 489.

No. 04–5723. RILEY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 362 F. 3d 302.

No. 04–5795. PERKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 363 F. 3d 317.

No. 04–5863. GRAJEDA-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 348 F. 3d 1123.

No. 04–5899. HARDY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 813.

No. 04–5957. SHELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 325 F. 3d 553.

No. 04–5959. BRINKLEY *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–5981. BUSH *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–5983. REYES *v.* MCELROY. C. A. 2d Cir. Certiorari denied.

No. 04–5990. WAYNE *v.* SANTA CLARA VALLEY TRANSPORTATION AUTHORITY. C. A. 9th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 578.

No. 04–6006. DAMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6046. PORTILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 383.

No. 04–6136. MAYE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–6257. ESPARAZA-VARELA, AKA ZAMORA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 1.

No. 04–6316. ARRIETA-BUENDIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 372 F. 3d 953.

No. 04–6346. AFFINITO *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 366 F. 3d 252.

No. 04–6368. CRAWFORD *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 372 F. 3d 1048.

No. 04–6403. RECIO-VALLEJO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 955.

No. 04–6416. BROOKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 367 F. 3d 1128.

No. 04–6482. BONNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 363 F. 3d 213.

No. 04–6552. VEASLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 32 Cal. 4th 704, 86 P. 3d 302.

No. 04–6562. LANGDON *v.* MALLONEE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 252.

No. 04–6578. GRABER *v.* OHIO. Ct. App. Ohio, Stark County. Certiorari denied.

No. 04–6621. CARTER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 156 N. C. App. 446, 577 S. E. 2d 640.

No. 04–6629. PAREDES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 491.

No. 04–6684. GLASS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 136 S. W. 3d 496.

No. 04–6688. FRANKS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 278 Ga. 246, 599 S. E. 2d 134.

No. 04–6740. HOFFNER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 102 Ohio St. 3d 358, 811 N. E. 2d 48.

No. 04–6760. ST. HELEN *v.* MILLER, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 374 F. 3d 181.

No. 04–6766. SOERING *v.* POWELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 145.

No. 04–6767. BROWN *v.* BLAINE ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6778. MARTIN *v.* KOLJONEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 567.

No. 04–6779. LAW *v.* KELLY, SUPERINTENDENT, CENTRAL MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 04–6782. MENSCH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 847 A. 2d 759.

No. 04–6785. ROBISON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 04–6786. SCHEANETTE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 144 S. W. 3d 503.

No. 04–6789. STRONG *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 142 S. W. 3d 702.

No. 04–6793. FRAZIER *v.* BAGLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6799. FRANKLIN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 934.

No. 04–6802. HUMPHREY *v.* PHARM CHEMICAL LABORATORY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 100 Fed. Appx. 837.

No. 04–6804. POLONCZYK *v.* POLONCZYK ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–6807. JIN WAI, AKA CHU *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–6809. WILSON *v.* PEGUESE, WARDEN. Ct. Sp. App. Md. Certiorari denied.

No. 04–6814. SAMPSON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 927.

No. 04–6817. BOATMAN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–6819. COBB *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE. Sup. Ct. Cal. Certiorari denied.

No. 04–6820. CAVANAUGH-BEY *v.* DISTRICT OF COLUMBIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6822. DANIEL *v.* CANTRELL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 375 F. 3d 377.

No. 04–6824. QUARLES *v.* LINEBERGER. C. A. 3d Cir. Certiorari denied. Reported below: 100 Fed. Appx. 127.

No. 04–6826. DIXON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 101 Ohio St. 3d 328, 805 N. E. 2d 1042.

No. 04–6827. CLARKE *v.* STOVALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6834. NELSON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–6836. BUTLER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6838. ROBLES *v.* GOODY'S FAMILY CLOTHING, INC. C. A. 11th Cir. Certiorari denied.

No. 04–6841. BUGGAGE *v.* SHEEHAN PIPELINE CONSTRUCTION CO. C. A. 10th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 185.

No. 04–6842. JIMENEZ *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6849. BLANCO *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6854. SPIDLE *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied.

No. 04–6855. STEWART *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 205.

No. 04–6862. JONES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 375 F. 3d 352.

No. 04–6864. AGUILERA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 04–6866. SEALS *v.* CITY OF WHEELING, WEST VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 972.

No. 04–6870. SALAZAR-VELASQUEZ *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 167.

No. 04–6871. THOMPSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–6873. SINGLETON *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6874. RUIZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6876. SANWICK *v.* UTAH. Ct. App. Utah. Certiorari denied.

No. 04–6879. RICKS *v.* PEGUESE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 989.

No. 04–6880. REMOI *v.* KLEIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 100 Fed. Appx. 127.

No. 04–6881. DOUGLAS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 878 So. 2d 1246.

No. 04–6884. DAVIS *v.* DUARTE ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–6890. WELSH *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 946.

No. 04–6891. TROUPE *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 808.

No. 04–6894. WATSON *v.* LENSING, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–6895. WILLIAMS *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 866 So. 2d 296.

No. 04–6897. WALLACE *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–6902. HILL *v.* MIAMI-DADE COUNTY MAYOR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 907.

No. 04–6904. HAVARD *v.* MCARTHUR ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–6905. HOLLAND *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 871 So. 2d 241.

No. 04–6906. HILL *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 04–6908. ACKLIN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6909. BRADLEY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6910. ROSS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6915. GARCIA *v.* CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–6926. TOWNSEND *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 606.

No. 04–6928. W. M. ET AL. *v.* COURT SERVICES OFFENDER SUPERVISION AGENCY. Ct. App. D. C. Certiorari denied. Reported below: 851 A. 2d 431.

No. 04–6930. LAMARCA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 04–6931. ALCARAZ MALDONADO *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 04–6934. JONES *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 04–6936. HUMPHREY *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 108 Fed. Appx. 691.

No. 04–6940. AKINGBALA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied.

No. 04–6942. APONTE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 579 Pa. 246, 855 A. 2d 800.

No. 04–6943. ENSWORTH *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 04–6946. CRAWFORD, AKA GILES *v.* ANNETTS, SUPERINTENDENT, WALLKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–6952. PARDON *v.* JONES, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–6955. LUNSFORD *v.* CARLTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6958. THOMAS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 371 F. 3d 782.

No. 04–6960. DEROSA *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 89 P. 3d 1124.

No. 04–6965. JOHNSON *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 199.

No. 04–6971. TRAYLOR *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 360 S. C. 74, 600 S. E. 2d 523.

No. 04–6975. JONES *v.* HENDERSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–6977. MARTINEZ *v.* SMITH. C. A. 9th Cir. Certiorari denied.

No. 04–6978. LAWAL *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 89 Fed. Appx. 774.

No. 04–6985. AREVALO *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6988. WILLIAMS *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–6996. CADY *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 04–6998. SLONE *v.* YAVAPAI COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–7000. MURPHY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7002. BERNARDEZ *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7007. TASBY, AKA AMEN-RA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7009. ORTEGA FLORES *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 04–7013. ESPINAL *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–7015. CASTEEL *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 04–7016. MILBURN *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 04–7017. DELIO *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 04–7018. TURNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–7020. WADE *v.* DORMIRE, SUPERINTENDENT, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied.

No. 04–7021. WILKINSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 33 Cal. 4th 821, 94 P. 3d 551.

No. 04–7022. TWIGGS *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. Sup. Ct. Pa. Certiorari denied.

No. 04–7030. LEWIS *v.* AMR ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 382.

No. 04–7031. MCSPADDEN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7032. DUE *v.* HAMLET, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7034. USHER *v.* WEST, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–7035. TURNER *v.* HUMPHREY, WARDEN. Super. Ct. Mitchell County, Ga. Certiorari denied.

No. 04–7044. EVERETT *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7046. VAUGHN *v.* CITY OF NORTH BRANCH, MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 73.

No. 04–7049. LAY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 04–7050. HART *v.* MULTNOMAH COUNTY, OREGON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 706.

No. 04–7051. HART *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 707.

No. 04–7053. ALI, FKA SISTRUNK *v.* DRAGOVICH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CHESTER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 96 Fed. Appx. 796.

No. 04–7055. OSTLER *v.* UTAH ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 232.

No. 04–7058. PAUL *v.* FOX ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 873.

No. 04–7062. LAWAL, AKA KOREDE *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 876.

No. 04–7063. MANNING *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7064. JONES *v.* DiGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7072. BARNES *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 04–7075. BODE *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 130.

No. 04–7077. NIX *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7078. PITTS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–7079. DUTRIEVILLE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 839 A. 2d 1151.

No. 04–7080. DOCKERAY *v.* FERNALD, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 1001.

No. 04–7081. JONES *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied.

No. 04–7082. MANDELAKA *v.* TAYLOR, COMMISSIONER, DELAWARE DEPARTMENT OF CORRECTION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 102 Fed. Appx. 768.

No. 04–7084. RASHAD, AKA JONES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 156 Md. App. 772.

No. 04–7085. SCHRADER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 452.

No. 04–7087. COLONEL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 150.

No. 04–7088. COOK *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 818.

No. 04–7089. ESCARENO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–7090. LANDRUM *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 806.

No. 04–7091. BATES *v.* GRANT, SUPERINTENDENT, SOUTHEASTERN CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 98 Fed. Appx. 11.

No. 04–7095. MONTUE *v.* NATIONAL CONCRETE CUTTING CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 752.

No. 04–7097. NALI *v.* BLUE CROSS BLUE SHIELD OF MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 04–7099. TERRY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–7103. WASKO *v.* SILVERBERG. C. A. 10th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 332.

No. 04–7104. BURKE *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Iredell County, N. C. Certiorari denied.

No. 04–7106. EVANS *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 371 F. 3d 438.

No. 04–7110. OWENS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 868 So. 2d 524.

No. 04–7114. HARINGTON *v.* BUDGE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 570.

No. 04–7115. FIELDER *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 379 F. 3d 113.

No. 04–7116. COWAN *v.* JOHNSON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–7118. AMEH *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 748.

No. 04–7119. MITCHELL *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 869 So. 2d 276.

No. 04–7121. NETTLES *v.* NEWLAND, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 144.

No. 04–7122. MCBREARTY *v.* CENTRAL TEXAS COLLEGE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 733.

No. 04–7124. SHOPE *v.* PUERTO RICO. C. A. 1st Cir. Certiorari denied.

No. 04–7127. PESCI *v.* GANSHEIMER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–7128. BYNUM *v.* FULTON-DEKALB HOSPITAL AUTHORITY, DBA GRADY MEMORIAL HOSPITAL. Super. Ct. Fulton County, Ga. Certiorari denied.

No. 04–7130. MARTINEZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 538.

No. 04–7133. WOODBERRY *v.* KANSAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 310.

No. 04–7134. PURVIS *v.* TIME & LIFE BUILDING. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 867.

No. 04–7136. WILLIAMS *v.* CARTER, SUPERINTENDENT, CLALLAM BAY CORRECTIONS CENTER, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7138. PHIPPS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 119 Wash. App. 1065.

No. 04–7139. CEASAR *v.* UNITED SERVICES AUTOMOBILE ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 859.

No. 04–7140. DE LA GARZA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–7143. PAULING *v.* RUSHTON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 948.

No. 04–7144. PEREZ *v.* MASSACHUSETTS. Super. Ct. Mass., Middlesex County. Certiorari denied.

No. 04–7146. SANDOVAL *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7147. DAVIS *v.* WERHOLTZ, SECRETARY, KANSAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 344.

No. 04–7148. ATLAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7150. MAGEE *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7151. CASTRO RUIZ *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7152. VALENTINE *v.* CARRIER CORP. C. A. 6th Cir. Certiorari denied.

No. 04–7156. DAVIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 817 A. 2d 1175.

No. 04–7161. DELGADO PARRENO, AKA DELGADO *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 753.

No. 04–7162. MITCHELL *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–7165. BURRELL *v.* BULLARD, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7166. KRONCKE *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 04–7167. GONZALES *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 163 N. C. App. 612, 594 S. E. 2d 258.

No. 04–7172. HUBBARD *v.* MOORE, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 378 F. 3d 333.

No. 04–7173. HOLTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 245.

No. 04–7176. ROBERTS *v.* DIRECTOR, BAPTIST HOSPITAL AND MEDICAL CENTER, EMPLOYEE RELATIONS. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 650.

No. 04–7177. SHAMOUN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 04–7183. PAGE *v.* SPITZER, ATTORNEY GENERAL OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 101 Fed. Appx. 842.

No. 04–7186. WILLIAMS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 8 App. Div. 3d 963, 778 N. Y. S. 2d 244.

No. 04–7189. DELGADILLO *v.* HICKMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 643.

No. 04–7190. POLLOCK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 32 Cal. 4th 1153, 89 P. 3d 353.

No. 04–7191. PURVIS *v.* PRESIDENTIAL PLAZA ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7192. CROWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 374 F. 3d 790.

No. 04–7193. BRAXTON *v.* BLANKS ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–7194. RICHARDSON *v.* SAFEWAY, INC. C. A. 10th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 275.

No. 04–7197. BROWN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7198. SOLIS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 414.

No. 04–7199. BETHEA *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7201. PARROTT *v.* GEHRKE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 908.

No. 04–7208. HUBBART *v.* KNAPP ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 379 F. 3d 773.

No. 04–7226. WORDEN *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 482.

No. 04–7229. PARSONS *v.* PRICE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–7232. BONTKOWSKI *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–7233. TRUSIANI *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 854 A. 2d 860.

No. 04–7234. ZARATE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 452.

No. 04–7238. WOOD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 104 Fed. Appx. 179.

No. 04–7241. SPENCER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 164 N. C. App. 601, 596 S. E. 2d 474.

No. 04–7246. ALSTON *v.* HEARST CORP., AKA HEARST BUSINESS COMMUNICATIONS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 318.

No. 04–7248. SMITH *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 04–7250. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–7251. PARKER *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 16.

No. 04–7254. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 381 F. 3d 114 and 108 Fed. Appx. 19.

No. 04–7257. COPADO-JARAMILLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 518.

No. 04–7260. CORONA-SOLORZANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 921.

No. 04–7262. SANTIAGO *v.* FREY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–7264. HOLT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 427.

No. 04–7268. LOFTIN *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7272. HAMMER *v.* AMAZON.COM. C. A. 2d Cir. Certiorari denied.

No. 04–7276. HARDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 959.

No. 04–7277. SOLIS GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 692.

No. 04–7279. HESSMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 369 F. 3d 1016.

No. 04–7280. HARMON *v.* MILLER-STOUT, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 671.

No. 04–7283. HALLMARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 449.

No. 04–7284. HAYNES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 372.

No. 04–7287. ROHN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 252.

No. 04–7288. REYNOLDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 381 F. 3d 404.

No. 04–7299. CANNON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 886.

No. 04–7303. FREE *v.* UNKNOWN OFFICERS OF THE BUREAU OF PRISONS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 334.

No. 04–7309. FULLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 374 F. 3d 617.

No. 04–7310. HERRERA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 375 F. 3d 399.

No. 04–7318. CASTRO-BALDERAS, AKA MEDINA-TELFINO, AKA LUNA *v.* UNITED STATES; ARVIZO-ENRIQUEZ *v.* UNITED STATES; CHAVEZ-MARTINEZ *v.* UNITED STATES; MORENO-AMAYA, AKA GARCIA, AKA MORENO, AKA GUADALUPE MORENO *v.* UNITED STATES; RODRIGUEZ-LOPEZ *v.* UNITED STATES; and SOTO-VAQUERA, AKA SOTO, AKA VAGUERRA SOTO, AKA SOTO VAGUERRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 615 (sixth judgment), 616 (third judgment), 617 (fourth judgment), 624 (first and fifth judgments), and 625 (second judgment).

No. 04–7320. SANTANA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 920.

No. 04–7321. RHODES *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 110 Fed. Appx. 118.

No. 04–7322. SANCHEZ-GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 626.

No. 04–7323. CISNEROS-MUNIZ *v.* UNITED STATES; and NAVARRETE-MORALES, AKA VALERANO-VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 614 (first judgment) and 628 (second judgment).

No. 04–7324. AGUILAR-GARCIA *v.* UNITED STATES (Reported below: 105 Fed. Appx. 618); BRACERO-LEMUS *v.* UNITED STATES (105 Fed. Appx. 618); CENTENO-SANCHEZ *v.* UNITED STATES (105

Fed. Appx. 621); ESPARZA-ROBLES *v.* UNITED STATES (106 Fed. Appx. 918); GONZALEZ-VALLEJO *v.* UNITED STATES (105 Fed. Appx. 619); MENDIETA-GOMEZ *v.* UNITED STATES (105 Fed. Appx. 613); NAVA-ALVAREZ *v.* UNITED STATES (105 Fed. Appx. 627); DELGADO-PEREZ *v.* UNITED STATES (105 Fed. Appx. 612); TORRES-PESINA *v.* UNITED STATES (105 Fed. Appx. 623); RODRIGUEZ-PUENTE *v.* UNITED STATES (108 Fed. Appx. 881); SANTOS-SALINAS *v.* UNITED STATES (106 Fed. Appx. 921); and CARREON-SUAREZ *v.* UNITED STATES (105 Fed. Appx. 614). C. A. 5th Cir. Certiorari denied.

No. 04–7325. LOPEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 380 F. 3d 538.

No. 04–7327. ZHANG *v.* CHARLES TOWN RACES & SLOTS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 798.

No. 04–7329. AVILA QUINONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 900.

No. 04–7332. HUDDLESTON *v.* CONNOR, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 04–7343. DERR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–7344. CARRENO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 2.

No. 04–7348. FORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 383 F. 3d 567.

No. 04–7349. FELICIANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7351. GREEN *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 24.

No. 04–7352. POWELL *v.* POLK, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 04–7356. LIEBIG *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 04–7360. MYERS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 216 W. Va. 120, 602 S. E. 2d 796.

No. 04–7364. PETERSEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–7366. QUEZADA-DAZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 808.

No. 04–7367. SANDOVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 390 F. 3d 1077 and 107 Fed. Appx. 149.

No. 04–7371. JANSEN *v.* HUTCHINSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 805.

No. 04–7372. LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 875.

No. 04–7375. PADGETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 801.

No. 04–7376. BRIDGEWATER *v.* BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–7381. HOLLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 381 F. 3d 80.

No. 04–7383. FUENTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 657.

No. 04–7384. HIGUERA-PERALTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 431.

No. 04–7385. HERNANDEZ-BENITEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 451.

No. 04–7387. ESPEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–7389. DEERING BEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–7390. WILSON *v.* WEBB, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 516.

No. 04–7393. BURSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 103.

No. 04–7395. VALLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–7396. YIM, AKA PIGMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 382 F. 3d 958.

No. 04–7397. KAEMMERLING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7401. STRANGE *v.* CONTINENTAL CASUALTY CO. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 126 S. W. 3d 676.

No. 04–7411. LOPEZ-SANTOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 690.

No. 04–7417. TRANI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–7420. RATLIFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–7422. ROTHWELL *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 37.

No. 04–7423. SIMMONS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–7424. TOWNSEND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 288.

No. 04–7425. THOMPSON *v.* BROWNLEE, ACTING SECRETARY OF THE ARMY. C. A. 10th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 250.

No. 04–7426. MERRITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 303.

No. 04–7431. CALDERON-PENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 383 F. 3d 254.

No. 04–7433. BERROA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 374 F. 3d 1053.

No. 04–7434. McINTOSH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 65.

No. 04–7435. McGHEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7436. McKENZIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 3.

No. 04–7439. BROWN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied.

No. 04–7443. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 479.

No. 04–7446. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 402.

No. 04–7449. WILHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 367.

No. 04–7461. MONTENEGRO-SAMANIEGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 492.

No. 04–7467. BISHAWI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 813.

No. 04–7469. BALLARD *v.* MUELLER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 780.

No. 04–7472. SULLIVAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 579.

No. 04–7473. KELLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 763.

No. 04–7475. WILLIAMSON *v.* SMITH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–7478. WASHPUN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 733.

No. 04–7479. SPRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–7481. PETERS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 842 A. 2d 714.

No. 04–7483. CALP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 358.

No. 04–7484. CHANEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–7486. DUNBAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 638.

No. 04–7487. EKEH, AKA HAMPTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 60.

No. 04–7490. NELSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 450.

No. 04–7492. POWELL *v.* BROOKS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 546.

No. 04–7496. TRICE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 849 A. 2d 1002.

No. 04–7500. HENLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 98.

No. 04–7502. BROWNING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 542.

No. 04–7505. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 606.

No. 04–7509. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 826.

No. 04–7510. HAMPTON *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 875.

No. 04–7511. HALL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 370 F. 3d 1204.

No. 04–7518. CROMARTIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7527. MOSLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 51.

No. 04–7529. DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7534. FIEDEKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 384 F. 3d 407.

No. 04–7535. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 447.

No. 04–7540. GRABER *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 32 Kan. App. 2d xxxv, 88 P. 3d 1257.

No. 04–7543. GUILLORY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 175.

No. 04–7544. SAGET *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 377 F. 3d 223 and 108 Fed. Appx. 667.

No. 04–7545. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7550. BARNES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 374 F. 3d 601.

No. 04–7565. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7567. BUNKLEY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 882 So. 2d 890.

No. 04–7568. SUGGS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 374 F. 3d 508.

No. 04–7578. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 252.

No. 04–7593. BROWN *v.* LAMPERT, DIRECTOR, WYOMING DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 381 F. 3d 1219.

No. 04–7595. CASIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–7597. LOCKHART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 382 F. 3d 447.

No. 04–7605. VON BRESSENSDORF ET VIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 679.

No. 04–7610. RASHID *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 383 F. 3d 769.

No. 04–7614. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 4.

No. 04–7620. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 780.

No. 04–7621. BARRERA-SAUCEDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 385 F. 3d 533.

No. 04–7622. BELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–7628. LYN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7632. LIPPMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 369 F. 3d 1039.

No. 04–7633. LEWIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 769.

No. 04–7637. MOYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 930.

No. 04–7655. BLACK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 373 F. 3d 1140.

No. 03–466. MASON, WARDEN *v.* MITCHELL. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 325 F. 3d 732.

No. 04–132. MICHIGAN *v.* MCRAE. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 469 Mich. 704, 678 N. W. 2d 425.

No. 04–366. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM *v.* EBBERS ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 368 F. 3d 86.

No. 04–448. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* HARDCASTLE. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 368 F. 3d 246.

No. 04–478. LOFTON ET AL. *v.* SECRETARY, FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, ET AL. C. A. 11th Cir. Motion of Child Welfare League of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 358 F. 3d 804.

No. 04–515. ELLIOTT *v.* VIRGINIA. Sup. Ct. Va. Motion of National Association of Criminal Defense Lawyers et al. for leave to file a brief as *amici curiae* granted. Reported below: 267 Va. 396, 593 S. E. 2d 270.

No. 04–522. UNITEDHEALTH GROUP, INC., FKA UNITED HEALTHCARE CORP., ET AL. *v.* KLAY ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 382 F. 3d 1241.

No. 04–537. DAVIDSON ET AL. *v.* VIVRA INC. ET AL.; and DAVIDSON ET AL. *v.* MEEHAN ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 04–568. FLORIDA *v.* FRANKLIN. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 876 So. 2d 607.

No. 04–582. RUI ONE CORP. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL. C. A. 9th Cir. Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 371 F. 3d 1137.

No. 04–591. CHRIST UNIVERSAL MISSION CHURCH *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Motion of American Jewish Congress et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 362 F. 3d 423.

No. 04–605. CHINEA-VARELA, AKA VARELA *v.* CBS BROADCASTING INC. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 104 Fed. Appx. 619.

No. 04–719. ZIEGLER *v.* BANK OF AMERICA, NT & SA, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 99 Fed. Appx. 819.

No. 04–6887. HARDISON *v.* NEWLAND, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 04–6922. DICKERSON *v.* BOCK, WARDEN. C. A. 6th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 04–6923. DICKERSON *v.* BOCK, WARDEN. C. A. 6th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 04–7524. BECKLEY *v.* MINER, WARDEN. C. A. 3d Cir. Certiorari before judgment denied.

Rehearing Denied

No. 03–1632. GANESAN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 816;

No. 03–1676. HAYES *v.* NICE SYSTEMS LTD. ET AL., *ante*, p. 819;

No. 03–9675. STRANGE *v.* NORFOLK SOUTHERN CORP., *ante*, p. 822;

No. 03–10091. HIRAHARA *v.* KRAMER, WARDEN, *ante*, p. 824;

No. 03–10096. GUILLORY *v.* CAIN, WARDEN, *ante*, p. 824;

No. 03–10321. MOSLEY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 830;

No. 03–10375. FIGUEROA *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 832;

No. 03–10376. ISAAC *v.* YARBOROUGH, WARDEN, *ante*, p. 832;

No. 03–10485. MOSLEY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 836;

No. 03–10488. PERRY *v.* UNITED PARCEL SERVICE, INC., *ante*, p. 836;

No. 03–10590. JOHNSON *v.* SHERRY, WARDEN, *ante*, p. 840;

No. 03–10620. NELSON *v.* UNITED STATES, *ante*, p. 978;

No. 03–10695. SMALLS *v.* UNITED STATES ET AL., *ante*, p. 942;
No. 03–10801. CROWLEY *v.* RENICO, WARDEN, *ante*, p. 851;
No. 03–10992. IN RE SMITH, *ante*, p. 808;
No. 03–11022. WILLIAMS *v.* UNITED STATES, *ante*, p. 864;
No. 04–50. ALLEN *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante*, p. 871;
No. 04–239. SCRINGER *v.* GREEN POINT BANK, *ante*, p. 957;
No. 04–285. SEIBEL ET UX. *v.* JLG INDUSTRIES, INC., ET AL., *ante*, p. 958;
No. 04–325. BRACKMAN *v.* INDIANA ET AL., *ante*, p. 979;
No. 04–361. CLISSURAS ET AL. *v.* CITY UNIVERSITY OF NEW YORK ET AL., *ante*, p. 987;
No. 04–411. ARMSTRONG *v.* BOULDEN, BANKRUPTCY JUDGE, UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH, ET AL.; ARMSTRONG *v.* CORNISH, CHIEF BANKRUPTCY JUDGE, UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF OKLAHOMA, ET AL.; and ARMSTRONG *v.* CORNISH, CHIEF BANKRUPTCY JUDGE, UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF OKLAHOMA, ET AL., *ante*, p. 960;
No. 04–458. MARSHALL *v.* BOWLES, JUDGE, *ante*, p. 988;
No. 04–5022. SHEIKH *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 878;
No. 04–5048. SIMS *v.* TANNER, *ante*, p. 879;
No. 04–5055. HAYES *v.* UNITED STATES, *ante*, p. 880;
No. 04–5069. PASSARELLI *v.* GIURBINO, WARDEN, *ante*, p. 881;
No. 04–5142. GRETHEN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 884;
No. 04–5143. DENNIS *v.* DEPARTMENT OF JUSTICE ET AL., *ante*, p. 884;
No. 04–5147. BOOSE *v.* UNITED STATES, *ante*, p. 884;
No. 04–5199. BRYANT *v.* HOWES, *ante*, p. 887;
No. 04–5221. DIETELBACH *v.* OHIO EDISON CO., *ante*, p. 888;
No. 04–5371. COMBS *v.* UNITED STATES, *ante*, p. 896;
No. 04–5394. SCOTT *v.* ANDREWS, WARDEN, *ante*, p. 897;
No. 04–5536. COLLIER *v.* HOME DEPOT, *ante*, p. 905;
No. 04–5551. MILLER-BEY *v.* PARKER, WARDEN, *ante*, p. 905;
No. 04–5577. IN RE DEROCK, *ante*, p. 923;
No. 04–5617. BELL *v.* LAMARQUE, WARDEN, *ante*, p. 961;

No. 04–5664. GRANDOIT *v.* TECHNICAL AID CORP., *ante*, p. 931;

No. 04–5666. GREEN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 931;

No. 04–5681. BENEFIEL *v.* DAVIS, SUPERINTENDENT, INDIANA STATE PRISON, *ante*, p. 979;

No. 04–5772. PHILLIPS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 933;

No. 04–5778. SCOTT *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 934;

No. 04–5788. HYMES *v.* MCILWAIN ET AL., *ante*, p. 934;

No. 04–5810. DEBOSE *v.* LAIN, *ante*, p. 935;

No. 04–5825. HARDY *v.* UNITED STATES (two judgments), *ante*, p. 912;

No. 04–5855. GRATTON *v.* CEPAK, WARDEN, ET AL., *ante*, p. 935;

No. 04–5894. VAUGHAN *v.* SOUTHERN AIR ET AL., *ante*, p. 935;

No. 04–5905. COTTON *v.* AGNES SLACK LP OF GEORGIA, *ante*, p. 946;

No. 04–5923. BLOM *v.* UNITED STATES, *ante*, p. 914;

No. 04–5958. HOTCHKISS *v.* CLAY TOWNSHIP, *ante*, p. 961;

No. 04–5975. AUSTIN *v.* SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY, *ante*, p. 961;

No. 04–5977. MUWAKKIL *v.* VIRGINIA ET AL. (two judgments), *ante*, p. 961;

No. 04–5979. MURRAY *v.* TOWN OF MANSURA, LOUISIANA, ET AL., *ante*, p. 961;

No. 04–5980. EDWARDS *v.* STRINGER ET AL., *ante*, p. 961;

No. 04–6049. TIMMONS *v.* MANATT, PHELPS & PHILLIPS, LLP, ET AL., *ante*, p. 963;

No. 04–6073. IN RE NORMAN, *ante*, p. 954;

No. 04–6077. FREE, AKA COIN *v.* UNITED STATES, *ante*, p. 937;

No. 04–6081. POTTER *v.* CASTRO, WARDEN, ET AL., *ante*, p. 947;

No. 04–6087. IN RE BOAKYE-YIADOM, *ante*, p. 923;

No. 04–6141. IN RE HARLEY, *ante*, p. 807;

No. 04–6143. GRETHEN *v.* CIRCUIT COURT OF VIRGINIA, CITY OF SUFFOLK, *ante*, p. 948;

No. 04–6149. BURNETT *v.* ASHCROFT, ATTORNEY GENERAL, ET AL., *ante*, p. 965;

No. 04–6153. WILSON *v.* TAYLOR, *ante*, p. 965;

No. 04–6183. SEARLES *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO, ILLINOIS, ET AL., *ante*, p. 980;

No. 04–6184. GRIFFIN ET UX. *v.* TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES, *ante*, p. 965;

No. 04–6207. MILLER *v.* TRAWICK ET AL., *ante*, p. 989;

No. 04–6226. MAYERS *v.* SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *ante*, p. 966;

No. 04–6259. HODGE ET VIR *v.* UNITED STATES POST OFFICE, LEXINGTON PARK, MARYLAND, ET AL., *ante*, p. 981;

No. 04–6303. SVANHOLM *v.* MONTGOMERY COUNTY, MARYLAND, ET AL., *ante*, p. 991;

No. 04–6305. DONALDSON *v.* UNITED STATES, *ante*, p. 981;

No. 04–6321. ANDERSON *v.* TURNER ENTERTAINMENT NETWORKS, INC., *ante*, p. 981;

No. 04–6382. COFIELD *v.* MARYLAND, *ante*, p. 967;

No. 04–6429. CAMPBELL *v.* UNITED STATES, *ante*, p. 969;

No. 04–6440. REED *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, *ante*, p. 970;

No. 04–6458. WRIGHT *v.* UNITED STATES, *ante*, p. 970;

No. 04–6486. MONSIVAIS SALAZAR *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1007;

No. 04–6517. MURPHY *v.* UNITED STATES, *ante*, p. 973;

No. 04–6519. KING *v.* UNITED STATES, *ante*, p. 973;

No. 04–6872. CALDWELL *v.* UNITED STATES, *ante*, p. 994; and

No. 04–6967. MCKOY *v.* UNITED STATES POSTAL SERVICE ET AL., *ante*, p. 1013. Petitions for rehearing denied.

No. 03–1482. ASSA'AD-FALTAS *v.* ASHCROFT, ATTORNEY GENERAL, ET AL., *ante*, p. 917. Petition for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of this petition.

No. 04–237. IRVIN, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, IRVIN, ET AL. *v.* HYDROCHEM INC. ET AL., *ante*, p. 976; and

No. 04–333. LOWE *v.* WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN ET AL., *ante*, p. 995. Petitions for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of these petitions.

No. 04–5393. STOKES *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 897. Motion for leave to file petition for rehearing denied.

JANUARY 12, 2005

Dismissal Under Rule 46

No. 04–403. HABERMAN *v.* CITY OF LONG BEACH, NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari dismissed under this Court's Rule 46. Reported below: 307 App. Div. 2d 313, 762 N. Y. S. 2d 425.

JANUARY 14, 2005

Miscellaneous Order

No. 04–5462. ROMPILLA *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS. C. A. 3d Cir. [Certiorari granted, 542 U. S. 966.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

Certiorari Granted

No. 03–1230. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL. Ct. App. Mich. Motions of Chamber of Commerce of the United States of America and National Private Truck Council et al. for leave to file briefs as *amici curiae* granted. Certiorari granted limited to the following question: "Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution."* Reported below: 255 Mich. App. 589, 662 N. W. 2d 784.

No. 03–1234. MID-CON FREIGHT SYSTEMS, INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL. Ct. App. Mich. Certiorari granted limited to the following question: "Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U. S. C. § 14504."* Reported below: 255 Mich. App. 589, 662 N. W. 2d 784.

No. 04–6432. GONZALEZ *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motion of peti-

*[REPORTER'S NOTE: For amendment to these orders, see *post*, p. 1096.]

tioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 366 F. 3d 1253.

JANUARY 18, 2005

Dismissal Under Rule 46

No. 04A508. KLAY *v.* HUMANA, INC., ET AL. C. A. 11th Cir. Application for an extension of time to file a petition for writ of certiorari dismissed under this Court's Rule 46.

Certiorari Granted—Vacated and Remanded

No. 03–8075. PEREZ-AQUILLAR *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Clark* v. *Martinez*, *ante*, p. 371. Reported below: 88 Fed. Appx. 382.

No. 03–8662. SIERRA *v.* ROMINE, WARDEN, ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Clark* v. *Martinez*, *ante*, p. 371. Reported below: 347 F. 3d 559.

Certiorari Dismissed

No. 04–7225. MARTIN *v.* NEBRASKA ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2378. IN RE DISBARMENT OF LEVINE. Disbarment entered. [For earlier order herein, see *ante*, p. 921.]

No. D–2379. IN RE DISBARMENT OF NERENBERG. Disbarment entered. [For earlier order herein, see *ante*, p. 922.]

No. D–2380. IN RE DISBARMENT OF JAMPOL. Disbarment entered. [For earlier order herein, see *ante*, p. 922.]

No. D–2381. IN RE DISBARMENT OF HANKIN. Disbarment entered. [For earlier order herein, see *ante*, p. 922.]

No. D–2382. IN RE DISBARMENT OF BATTS. Disbarment entered. [For earlier order herein, see *ante*, p. 922.]

No. D–2383. IN RE DISBARMENT OF HILAIRE. Disbarment entered. [For earlier order herein, see *ante*, p. 922.]

No. D–2384. IN RE DISBARMENT OF ALLEN. Disbarment entered. [For earlier order herein, see *ante*, p. 922.]

No. D–2385. IN RE DISBARMENT OF MASON. Disbarment entered. [For earlier order herein, see *ante*, p. 977.]

No. D–2386. IN RE DISBARMENT OF MCGOWAN. Disbarment entered. [For earlier order herein, see *ante*, p. 977.]

No. 04M39. MILES *v.* WTMX RADIO NETWORK ET AL.; and No. 04M40. EL BEY *v.* HEIFNER ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 04–7596. MANESSIS *v.* NEW YORK CITY DEPARTMENT OF TRANSPORTATION ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 8, 2005, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 04–7768. IN RE GAGAN. Petition for writ of habeas corpus denied.

No. 04–7214. IN RE BARKCLAY;
No. 04–7215. IN RE BARKCLAY;
No. 04–7216. IN RE BARKCLAY;
No. 04–7218. IN RE BARKCLAY;
No. 04–7269. IN RE BROWN;
No. 04–7564. IN RE BROWN; and
No. 04–7642. IN RE YOUNG. Petitions for writs of mandamus denied.

No. 04–7275. IN RE FISH. Petition for writ of mandamus and/or prohibition denied.

No. 04–7333. IN RE GRISSO. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Denied

No. 03–1250. TROY CAB, INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL. Ct. App. Mich. Certiorari denied. Reported below: 255 Mich. App. 589, 662 N. W. 2d 784.

No. 04–350. FLUOR DANIEL, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 332 F. 3d 961.

No. 04–357. GUNDY, WARDEN *v.* SCOTT. C. A. 6th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 476.

No. 04–417. BILL HEARD CHEVROLET INC.-PLANT CITY *v.* BRAGG ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 374 F. 3d 1060.

No. 04–439. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–463. JEAN CO., LTD. *v.* ELONEX I. P. HOLDINGS, LTD., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 97 Fed. Appx. 329.

No. 04–471. FAUST *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 274 Wis. 2d 183, 682 N. W. 2d 371.

No. 04–488. CRYSTIAN ET AL. *v.* TOWER LOAN OF MISSISSIPPI INC. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 952.

No. 04–499. JAE WON JEONG *v.* TAIHEIYO CEMENT CORP. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 117 Cal. App. 4th 380, 12 Cal. Rptr. 3d 32.

No. 04–557. CUENCA *v.* UNIVERSITY OF KANSAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 782.

No. 04–641. DUPAGE COUNTY, ILLINOIS *v.* PALMETTO PROPERTIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 375 F. 3d 542.

No. 04–649. PARMAR *v.* CALIFORNIA. App. Div., Super. Ct. Cal., County of Sacramento. Certiorari denied.

No. 04–650. KRETCHMAR *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD. Sup. Ct. Pa. Certiorari denied.

No. 04–655. URBAN *v.* HURLEY. C. A. 2d Cir. Certiorari denied.

No. 04–657. WOOD *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 164 N. C. App. 601, 596 S. E. 2d 472.

No. 04–661. KORESKO ET AL. *v.* FARLEY ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 844 A. 2d 607.

No. 04–663. RADLOFF *v.* CITY OF OELWEIN, IOWA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 380 F. 3d 344.

No. 04–687. SHAIN ET AL. *v.* VENEMAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 376 F. 3d 815.

No. 04–689. CARMAN *v.* FUENTES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 224.

No. 04–696. HIGGS *v.* COLORADO. Dist. Ct. Colo., Broomfield County. Certiorari denied.

No. 04–701. SIBLEY *v.* SIBLEY. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 04–708. MAINE SHIPYARD & MARINE RAILWAY, INC. *v.* PNC BANK DELAWARE, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 381 F. 3d 183.

No. 04–713. SINGH *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 555.

No. 04–729. CLARK *v.* WHIRLPOOL CORP. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 750.

No. 04–737. BRENEMAN ET AL. *v.* UNITED STATES EX REL. FEDERAL AVIATION ADMINISTRATION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 381 F. 3d 33.

No. 04–761. PAXTON RESOURCES, L. L. C. *v.* BRANNAMAN ET UX. Sup. Ct. Wyo. Certiorari denied. Reported below: 95 P. 3d 796.

No. 04–769. JENSEN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 119 Wash. App. 1018.

No. 04–817. DAVIS *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 60 M. J. 337.

No. 04–834. KEYSER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 60 M. J. 338.

No. 04–5724. SANTOS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 211 Ill. 2d 395, 813 N. E. 2d 159.

No. 04–6394. FULANI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 368 F. 3d 351.

No. 04–6421. GOINS *v.* LOCAL 2047 I L A EXECUTIVE BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 700.

No. 04–6521. HUMBERTO CARDENAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 985.

No. 04–6790. BRYANT *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 969.

No. 04–6914. MOBLEY *v.* SCHOFIELD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 366 F. 3d 1253.

No. 04–7202. DAVIS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7213. BURTON *v.* MOTE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–7217. MARSHALL *v.* MYERS ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–7221. NASH *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 877 So. 2d 132.

No. 04–7224. KRONCKE *v.* HOOD ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–7230. BROWN *v.* MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 04–7236. WOODBERRY *v.* BRUCE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 370.

No. 04–7237. WATKINS *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 04–7239. WILMS *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 04–7240. MORRIS *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 910.

No. 04–7243. RUFFIN *v.* MECHLING, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7244. SPENCER *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW. C. A. 3d Cir. Certiorari denied.

No. 04–7245. NALI *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 653.

No. 04–7247. SMITH *v.* LEWIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7252. MCKINNEY *v.* HUMPHREY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–7255. NIMMONS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–7256. PHIFER *v.* WABASH VALLEY CORRECTIONAL FACILITY ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–7258. DAVIS *v.* NEWLAND, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 659.

No. 04–7261. THOMAS *v.* CREDIT-BASED ASSET SERVICING & SECURITIZATION, LLC. Ct. App. Ga. Certiorari denied.

No. 04–7263. SANDERS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7265. ACKER *v.* ROOSE ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–7266. JONES-EL ET AL. *v.* BERGE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–7267. ELLIS *v.* GUY ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 875 So. 2d 685.

No. 04–7273. HERNANDEZ *v.* KEANE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 341 F. 3d 137.

No. 04–7274. GORDON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 882 So. 2d 384.

No. 04–7278. HORTON *v.* ALLEN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CEDAR JUNCTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 370 F. 3d 75.

No. 04–7285. DE LA GARZA *v.* STRINGFELLOW ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 443.

No. 04–7295. BRAXTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 04–7301. WORLEY *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 270.

No. 04–7313. HOLMES *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7337. FARMER *v.* POLICE DEPARTMENT OF CARRBORO, NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 523.

No. 04–7353. PRIESTER *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 382 F. 3d 394.

No. 04–7380. GLANDA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 5 App. Div. 3d 945, 774 N. Y. S. 2d 576.

No. 04–7407. BARKER *v.* TEXAS DEPARTMENT OF PROTECTIVE & REGULATORY SERVICES. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 04–7465. MARTINEZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 04–7506. ROBERTS *v.* BARRERAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 224.

No. 04–7512. GOINS *v.* NEVADA. C. A. 9th Cir. Certiorari denied.

No. 04–7513. FLEMING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 269.

No. 04–7559. CASSANO *v.* UNGER, SUPERINTENDENT, LIVINGSTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–7623. BERT *v.* SNOW, SECRETARY OF THE TREASURY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 451.

No. 04–7639. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 594.

No. 04–7641. TATE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7649. SPRINGMEIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 843.

No. 04–7651. ROYAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 786.

No. 04–7658. BUCK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–7665. RAMOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 363 F. 3d 631.

No. 04–7666. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7668. SIMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 376 F. 3d 705.

No. 04–7671. SANTIAGO *v.* LAMANNA, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 99 Fed. Appx. 417.

No. 04–7675. CHILDERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 633.

No. 04–7676. COFFEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 654.

No. 04–7677. DIXSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7683. LATTNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 385 F. 3d 947.

No. 04–7684. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 5.

No. 04–7690. ESQUIVEL-CABRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 251.

No. 04–7692. DORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7699. HUNTER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 848 A. 2d 616.

No. 04–7703. GONZALEZ-GONZALES, AKA SOTO FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 914.

No. 03–920. CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, SEATTLE, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. *v.* MARTINEZ-VAZQUEZ. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 346 F. 3d 903.

No. 03–1265. CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, SEATTLE, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. *v.* RIVERON-AGUILERA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 03–1436. ALCANTER, FIELD OFFICE DIRECTOR, SAN FRANCISCO, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. *v.* PEDROSO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 04–531. MICHIGAN *v.* RUSSELL. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis*

granted. Certiorari denied. Reported below: 471 Mich. 182, 684 N. W. 2d 745.

No. 04–647. BURNS ET AL. *v.* PNC BANK NATIONAL ASSN., SUCCESSOR BY MERGER TO FIRST EASTERN BANK, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 104 Fed. Appx. 811.

No. 04–695. HOUSEY PHARMACEUTICALS, INC. *v.* ASTRAZENECA UK LTD. ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE O'CONNOR and JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 366 F. 3d 1348.

No. 04–702. HAMDAN *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 04–717. AMERICAN AXLE & MANUFACTURING, INC. *v.* DANA CORP. C. A. Fed. Cir. Motion of Cisco Systems, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 110 Fed. Appx. 871.

No. 04–8146 (04A620). BEARDSLEE *v.* BROWN, WARDEN. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 393 F. 3d 1032.

No. 04–8157 (04A622). BEARDSLEE *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 395 F. 3d 1064.

Rehearing Denied

No. 04–5804. IBRAHIM *v.* IBRAHIM, *ante*, p. 934;

No. 04–6162. CANDELARIA *v.* UTAH, *ante*, p. 965; and

No. 04–6381. DRABOVSKIY *v.* UNITED STATES, *ante*, p. 950. Petitions for rehearing denied.

JANUARY 21, 2005

Miscellaneous Order

No. 03–1230. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL.; and

No. 03–1234. MID-CON FREIGHT SYSTEMS, INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL. Ct. App. Mich. [Certiorari granted, *ante*, p. 1086.] Orders granting petitions for writs of certiorari amended to read as follows: "Certiorari granted limited to the following questions: 1. 'Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.' 2. 'Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U. S. C. § 14504.' Cases consolidated, and a total of one hour allotted for oral argument."

JANUARY 24, 2005

Certiorari Granted—Reversed and Remanded. (See No. 04–394, *ante*, p. 447.)

Certiorari Granted—Vacated and Remanded

No. 03–1326. HAWKINS *v.* UNITED STATES, 542 U. S. 919; and No. 03–1434. LAUERSEN *v.* UNITED STATES, 541 U. S. 1044. Petitions for rehearing granted. Orders denying petitions for writs of certiorari vacated. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, *ante*, p. 220.

No. 03–1668. MITRIONE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Reported below: 357 F. 3d 712;

No. 03–1670. THURSTON *v.* UNITED STATES. C. A. 1st Cir. Reported below: 358 F. 3d 51;

No. 04–75. STERN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 96 Fed. Appx. 855;

No. 04–95. CLIFTON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 95 Fed. Appx. 559;

No. 04–118. ALTOBELLO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Reported below: 361 F. 3d 382;

No. 04–121. CRAWFORD *v.* UNITED STATES. C. A. 5th Cir. Reported below: 96 Fed. Appx. 210;

No. 04–137. TRIPLETT *v.* UNITED STATES. C. A. 11th Cir. Reported below: 99 Fed. Appx. 882;

No. 04–145. MICKLIN *v.* UNITED STATES. C. A. 6th Cir. Reported below: 89 Fed. Appx. 977;

No. 04–193. HAMMOUD, AKA ALBOUSALEH, AKA ABOUSALEH *v.* UNITED STATES. C. A. 4th Cir. Reported below: 378 F. 3d 426;

No. 04–208. JILES *v.* UNITED STATES. C. A. 10th Cir.;

No. 04–244. DUPURTON *v.* UNITED STATES. C. A. 2d Cir. Reported below: 368 F. 3d 880;

No. 04–264. COURTNEY *v.* UNITED STATES. C. A. 8th Cir. Reported below: 362 F. 3d 497;

No. 04–274. FLARIDA, AKA STONE *v.* UNITED STATES. C. A. 9th Cir. Reported below: 97 Fed. Appx. 794;

No. 04–314. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Reported below: 100 Fed. Appx. 571;

No. 04–322. FRANCIS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 367 F. 3d 805;

No. 04–337. CALLIPARI *v.* UNITED STATES. C. A. 1st Cir. Reported below: 368 F. 3d 22;

No. 04–358. MCCORMACK *v.* UNITED STATES. C. A. 1st Cir. Reported below: 371 F. 3d 22;

No. 04–385. STERN *v.* UNITED STATES. C. A. 1st Cir.;

No. 04–457. LONG *v.* UNITED STATES. C. A. 4th Cir. Reported below: 95 Fed. Appx. 483;

No. 04–503. WINT *v.* UNITED STATES. C. A. 2d Cir. Reported below: 97 Fed. Appx. 352;

No. 04–548. TATE *v.* UNITED STATES. C. A. 9th Cir. Reported below: 99 Fed. Appx. 817;

No. 04–592. TANG *v.* UNITED STATES. C. A. 9th Cir. Reported below: 103 Fed. Appx. 121;

No. 04–652. CALHOUN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 383 F. 3d 281;

No. 04–676. CHILINGIRIAN *v.* UNITED STATES. C. A. 6th Cir. Reported below: 95 Fed. Appx. 782;

No. 04–762. DURAN BADILLA *v.* UNITED STATES. C. A. 10th Cir. Reported below: 383 F. 3d 1137;

No. 04–800. SCHNEIDER *v.* UNITED STATES. C. A. 6th Cir. Reported below: 110 Fed. Appx. 583; and

No. 04–812. MORALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, *ante*, p. 220.

No. 03–9262. MEZA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 82 Fed. Appx. 122;

No. 03–10705. HOLMES *v.* UNITED STATES. C. A. D. C. Cir. Reported below: 360 F. 3d 1339;

No. 03–10727. LEUNG *v.* UNITED STATES. C. A. 9th Cir. Reported below: 95 Fed. Appx. 876;

No. 03–10742. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 84 Fed. Appx. 449;

No. 03–10752. MASTERS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 97 Fed. Appx. 906;

No. 03–10755. MICHEL, AKA DOE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 88 Fed. Appx. 623;

No. 03–10757. PATTERSON *v.* UNITED STATES. C. A. 11th Cir.;

No. 03–10760. TURNBULL, AKA TURNBOUGH *v.* UNITED STATES. C. A. 8th Cir. Reported below: 349 F. 3d 558;

No. 03–10802. COONEY *v.* UNITED STATES. C. A. 6th Cir. Reported below: 87 Fed. Appx. 580;

No. 03–10807. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 357 F. 3d 726;

No. 03–10813. NORMAN *v.* UNITED STATES. C. A. 8th Cir. Reported below: 354 F. 3d 969;

No. 03–10819. FISHER *v.* UNITED STATES. C. A. 4th Cir. Reported below: 88 Fed. Appx. 662;

No. 03–10836. SCHOENAUER *v.* UNITED STATES. C. A. 8th Cir. Reported below: 354 F. 3d 969;

No. 03–10851. MORENO *v.* UNITED STATES. C. A. 9th Cir. Reported below: 93 Fed. Appx. 131;

No. 03–10884. NORTH *v.* UNITED STATES. C. A. 1st Cir. Reported below: 86 Fed. Appx. 427;

No. 03–10897. GLAUM *v.* UNITED STATES. C. A. 1st Cir. Reported below: 356 F. 3d 169;

No. 03–10938. DIAZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 95 Fed. Appx. 535;

No. 03–10961. HARRINGTON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 89 Fed. Appx. 473;

No. 03–10979. MERRITT *v.* UNITED STATES. C. A. 7th Cir. Reported below: 361 F. 3d 1005;

No. 03–10983. BANKS, AKA BARNNES *v.* UNITED STATES. C. A. 3d Cir. Reported below: 85 Fed. Appx. 875;

No. 03–11067. DUNBAR *v.* UNITED STATES. C. A. 6th Cir. Reported below: 357 F. 3d 582;

No. 04–5031. CARRENO *v.* UNITED STATES. C. A. 9th Cir. Reported below: 363 F. 3d 883;

No. 04–5041. SAPP *v.* UNITED STATES. C. A. 2d Cir. Reported below: 91 Fed. Appx. 195;

No. 04–5047. GUEVARA *v.* UNITED STATES. C. A. 2d Cir. Reported below: 99 Fed. Appx. 300;

No. 04–5052. GARNER *v.* UNITED STATES. C. A. 6th Cir. Reported below: 355 F. 3d 942;

No. 04–5070. YOUNG *v.* UNITED STATES. C. A. 7th Cir. Reported below: 363 F. 3d 631;

No. 04–5084. LOFLIN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 91 Fed. Appx. 873;

No. 04–5085. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Reported below: 363 F. 3d 631;

No. 04–5086. RAMJOHN *v.* UNITED STATES. C. A. 2d Cir. Reported below: 93 Fed. Appx. 310;

No. 04–5097. COOK *v.* UNITED STATES. C. A. 6th Cir. Reported below: 102 Fed. Appx. 888;

No. 04–5106. RESTREPO *v.* UNITED STATES. C. A. 2d Cir. Reported below: 90 Fed. Appx. 412;

No. 04–5113. MARTINEZ-FIGUEROA *v.* UNITED STATES. C. A. 8th Cir. Reported below: 363 F. 3d 679;

No. 04–5117. SHULL *v.* UNITED STATES. C. A. 4th Cir. Reported below: 93 Fed. Appx. 586;

No. 04–5130. FORBES *v.* UNITED STATES. C. A. 2d Cir. Reported below: 356 F. 3d 478;

No. 04–5137. HARDRIDGE *v.* UNITED STATES. C. A. 10th Cir. Reported below: 100 Fed. Appx. 743;

No. 04–5152. MESINA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 99 Fed. Appx. 877;

No. 04–5155. BUSH *v.* UNITED STATES. C. A. 11th Cir. Reported below: 103 Fed. Appx. 667;

No. 04–5169. CLARK *v.* UNITED STATES. C. A. 10th Cir. Reported below: 94 Fed. Appx. 769;

No. 04–5171. MUHAMMAD *v.* UNITED STATES. C. A. 5th Cir. Reported below: 91 Fed. Appx. 972;

No. 04–5174. WATSON *v.* UNITED STATES. C. A. 3d Cir. Reported below: 93 Fed. Appx. 481;

No. 04–5187. BARREIRO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 88 Fed. Appx. 390;

No. 04–5189. MOSLEY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 103 Fed. Appx. 665;

No. 04–5190. MOHAMMED *v.* UNITED STATES. C. A. 11th Cir. Reported below: 99 Fed. Appx. 885;

No. 04–5191. PEREZ *v.* UNITED STATES. C. A. 2d Cir. Reported below: 95 Fed. Appx. 376;

No. 04–5193. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 92 Fed. Appx. 781;

No. 04–5194. SMITH *v.* UNITED STATES. C. A. 11th Cir. Reported below: 103 Fed. Appx. 665;

No. 04–5200. JACOBS *v.* UNITED STATES. C. A. 3d Cir. Reported below: 94 Fed. Appx. 893;

No. 04–5210. YARBOR *v.* UNITED STATES. C. A. 7th Cir. Reported below: 363 F. 3d 654;

No. 04–5214. GONZALEZ-CAPETILLO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 86 Fed. Appx. 774;

No. 04–5239. ZIMMERMAN *v.* UNITED STATES. C. A. 8th Cir. Reported below: 88 Fed. Appx. 977;

No. 04–5249. BOOHER *v.* UNITED STATES. C. A. 4th Cir. Reported below: 94 Fed. Appx. 160;

No. 04–5250. GABRIEL *v.* UNITED STATES. C. A. D. C. Cir. Reported below: 365 F. 3d 29;

No. 04–5262. PHILLIPS *v.* UNITED STATES. C. A. 10th Cir. Reported below: 94 Fed. Appx. 796;

No. 04–5263. PINEIRO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 377 F. 3d 464;

No. 04–5272. BIJOU, AKA BIGOU *v.* UNITED STATES. C. A. 4th Cir. Reported below: 92 Fed. Appx. 966;

No. 04–5280. RODRIGUEZ *v.* UNITED STATES. C. A. 8th Cir. Reported below: 367 F. 3d 1019;

No. 04–5288. PRIME *v.* UNITED STATES. C. A. 9th Cir. Reported below: 363 F. 3d 1028;

No. 04–5289. NOMAR *v.* UNITED STATES. C. A. 4th Cir. Reported below: 95 Fed. Appx. 28;

No. 04–5295. MILLER, AKA JONES, AKA RUSSELL *v.* UNITED STATES. C. A. 3d Cir. Reported below: 94 Fed. Appx. 121;

No. 04–5296. OGLE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 92 Fed. Appx. 996;

No. 04–5298. PAGLEY *v.* UNITED STATES. C. A. 3d Cir. Reported below: 94 Fed. Appx. 104;

No. 04–5305. PARKS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 364 F. 3d 902;

No. 04–5327. TOROGUET-CERVANTES *v.* UNITED STATES. C. A. 11th Cir. Reported below: 97 Fed. Appx. 904;

No. 04–5330. WASHINGTON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 95 Fed. Appx. 701;

No. 04–5331. JARDINE *v.* UNITED STATES. C. A. 10th Cir. Reported below: 364 F. 3d 1200;

No. 04–5332. JACOBS *v.* UNITED STATES. C. A. 3d Cir. Reported below: 96 Fed. Appx. 812;

No. 04–5352. JARA *v.* UNITED STATES. C. A. 6th Cir. Reported below: 96 Fed. Appx. 329;

No. 04–5365. CHAMPAGNE *v.* UNITED STATES. C. A. 1st Cir. Reported below: 362 F. 3d 60;

No. 04–5374. WIGGINS *v.* UNITED STATES. C. A. 3d Cir. Reported below: 94 Fed. Appx. 959;

No. 04–5388. MUNOZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 94 Fed. Appx. 243;

No. 04–5431. COOK *v.* UNITED STATES. C. A. 9th Cir. Reported below: 91 Fed. Appx. 580;

No. 04–5432. CURRIE *v.* UNITED STATES. C. A. 6th Cir. Reported below: 96 Fed. Appx. 369;

No. 04–5435. PETERS *v.* UNITED STATES. C. A. 6th Cir. Reported below: 98 Fed. Appx. 449;

No. 04–5436. PHYLLIAN, AKA ROBINSON *v.* UNITED STATES. C. A. 3d Cir. Reported below: 95 Fed. Appx. 430;

No. 04–5444. WYNN *v.* UNITED STATES. C. A. 6th Cir. Reported below: 365 F. 3d 546;

No. 04–5448. LARA-LUCIANO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 95 Fed. Appx. 654;

No. 04–5450. SILVERIO *v.* UNITED STATES. C. A. 2d Cir. Reported below: 96 Fed. Appx. 788;

No. 04–5451. QUINONES *v.* UNITED STATES. C. A. 1st Cir.;

No. 04–5465. GAITHER *v.* UNITED STATES. C. A. 10th Cir. Reported below: 96 Fed. Appx. 615;

No. 04–5466. BROWN *v.* UNITED STATES. C. A. 10th Cir. Reported below: 96 Fed. Appx. 570;

No. 04–5469. HUGHES *v.* UNITED STATES. C. A. 5th Cir. Reported below: 95 Fed. Appx. 671;

No. 04–5470. HARRISON *v.* UNITED STATES. C. A. 3d Cir. Reported below: 357 F. 3d 314;

No. 04–5471. GILFORD *v.* UNITED STATES. C. A. 5th Cir. Reported below: 95 Fed. Appx. 549;

No. 04–5476. BARBOUR *v.* UNITED STATES. C. A. 3d Cir. Reported below: 349 F. 3d 138;

No. 04–5481. HITE *v.* UNITED STATES. C. A. 7th Cir. Reported below: 364 F. 3d 874;

No. 04–5488. GARCIA-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Reported below: 97 Fed. Appx. 904;

No. 04–5493. LINEBERRY *v.* UNITED STATES. C. A. 5th Cir. Reported below: 93 Fed. Appx. 632;

No. 04–5497. OWENS *v.* UNITED STATES. C. A. 9th Cir. Reported below: 98 Fed. Appx. 595;

No. 04–5504. CALLOWAY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 107 Fed. Appx. 892;

No. 04–5516. SMITH *v.* UNITED STATES. C. A. 8th Cir. Reported below: 363 F. 3d 811;

No. 04–5517. JACOBS *v.* UNITED STATES. C. A. 3d Cir. Reported below: 93 Fed. Appx. 488;

No. 04–5520. RICE *v.* UNITED STATES. C. A. 10th Cir. Reported below: 358 F. 3d 1268;

No. 04–5523. WILSON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 94 Fed. Appx. 294;

No. 04–5525. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 95 Fed. Appx. 555;

No. 04–5528. WARD, AKA WILSON *v.* UNITED STATES. C. A. 10th Cir. Reported below: 96 Fed. Appx. 615;

No. 04–5541. WILSON *v.* UNITED STATES. C. A. 10th Cir. Reported below: 95 Fed. Appx. 970;

No. 04–5545. JORDAN *v.* UNITED STATES. C. A. 9th Cir. Reported below: 88 Fed. Appx. 247;

No. 04–5546. RUBIO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 95 Fed. Appx. 713;

No. 04–5564. DREWRY *v.* UNITED STATES. C. A. 10th Cir. Reported below: 365 F. 3d 957;

No. 04–5571. MISKE *v.* UNITED STATES. C. A. 9th Cir. Reported below: 101 Fed. Appx. 252;

No. 04–5582. ORTEGA *v.* UNITED STATES. C. A. 2d Cir. Reported below: 82 Fed. Appx. 717;

No. 04–5589. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Reported below: 365 F. 3d 649;

No. 04–5592. SMITH *v.* UNITED STATES. C. A. 8th Cir. Reported below: 367 F. 3d 737;

No. 04–5594. RUELAS *v.* UNITED STATES. C. A. 9th Cir. Reported below: 98 Fed. Appx. 615;

No. 04–5595. RAMOS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 96 Fed. Appx. 246;

No. 04–5599. WALTON *v.* UNITED STATES. C. A. 11th Cir. Reported below: 97 Fed. Appx. 904;

No. 04–5607. LUEBBERT *v.* UNITED STATES. C. A. 6th Cir. Reported below: 96 Fed. Appx. 383;

No. 04–5614. BROWN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 96 Fed. Appx. 881;

No. 04–5623. DEVITA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 86 Fed. Appx. 738;

No. 04–5630. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Reported below: 97 Fed. Appx. 615;

No. 04–5631. MENDEZ *v.* UNITED STATES. C. A. 6th Cir. Reported below: 97 Fed. Appx. 583;

No. 04–5632. MCCANN *v.* UNITED STATES. C. A. 1st Cir. Reported below: 366 F. 3d 46;

No. 04–5634. LEEWRIGHT *v.* UNITED STATES. C. A. 5th Cir. Reported below: 96 Fed. Appx. 952;

No. 04–5639. SMITH *v.* UNITED STATES. C. A. 11th Cir. Reported below: 107 Fed. Appx. 185;

No. 04–5641. SWEAT *v.* UNITED STATES. C. A. 5th Cir.;

No. 04–5647. HOUCHINS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Reported below: 364 F. 3d 182;

No. 04–5662. GARCIA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 99 Fed. Appx. 885;

No. 04–5667. GILLEY *v.* UNITED STATES. C. A. 5th Cir. Reported below: 368 F. 3d 505;

No. 04–5668. KREUTER *v.* UNITED STATES. C. A. 5th Cir. Reported below: 96 Fed. Appx. 950;

No. 04–5671. BERN *v.* UNITED STATES. C. A. 8th Cir. Reported below: 96 Fed. Appx. 428;

No. 04–5678. STUBBS *v.* UNITED STATES. C. A. 6th Cir. Reported below: 97 Fed. Appx. 564;

No. 04–5679. NNAJI *v.* UNITED STATES. C. A. 6th Cir. Reported below: 90 Fed. Appx. 138;

No. 04–5680. ALIZONDO *v.* UNITED STATES. C. A. 9th Cir. Reported below: 91 Fed. Appx. 32;

No. 04–5692. ESTEVEZ *v.* UNITED STATES. C. A. 1st Cir.;

No. 04–5694. PORTOCARRERO CANA, AKA PORTOKAERO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 91 Fed. Appx. 654;

No. 04–5699. MURILLO KACHIMBO, AKA AKHIN MURILLO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 91 Fed. Appx. 654;

No. 04–5702. GOMES RIVAS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 91 Fed. Appx. 654;

No. 04–5705. AGUIRRE ZATISAVAL *v.* UNITED STATES. C. A. 11th Cir. Reported below: 91 Fed. Appx. 654;

No. 04–5706. VASQUEZ, AKA LNU *v.* UNITED STATES. C. A. 7th Cir. Reported below: 97 Fed. Appx. 676;

No. 04–5709. GORDON *v.* UNITED STATES. C. A. 2d Cir. Reported below: 96 Fed. Appx. 58;

No. 04–5716. ANDRADE, AKA GUERRARO-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 96 Fed. Appx. 241;

No. 04–5721. ABBOTT *v.* UNITED STATES. C. A. 8th Cir. Reported below: 98 Fed. Appx. 567;

No. 04–5730. WHALEN *v.* UNITED STATES. C. A. 9th Cir. Reported below: 97 Fed. Appx. 132;

No. 04–5732. WILSON *v.* UNITED STATES. C. A. 4th Cir. Reported below: 96 Fed. Appx. 875;

No. 04–5734. TRIGG *v.* UNITED STATES. C. A. 5th Cir.;

No. 04–5738. CERVANTES-SOSA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 104 Fed. Appx. 151;

No. 04–5740. CURTIS *v.* UNITED STATES. C. A. 10th Cir.;

No. 04–5752. BILLINGSLEY *v.* UNITED STATES. C. A. 9th Cir.;

No. 04–5762. GORE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 93 Fed. Appx. 569;

No. 04–5763. GORE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 93 Fed. Appx. 569;

No. 04–5765. ELLIS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 93 Fed. Appx. 497;

No. 04–5770. TORRES *v.* UNITED STATES. C. A. 2d Cir. Reported below: 90 Fed. Appx. 412;

No. 04–5771. BLOUNT *v.* UNITED STATES. C. A. 4th Cir. Reported below: 364 F. 3d 173;

No. 04–5802. WHITE *v.* UNITED STATES. C. A. 7th Cir. Reported below: 368 F. 3d 911;

No. 04–5808. WEBB *v.* UNITED STATES. C. A. 5th Cir. Reported below: 96 Fed. Appx. 259;

No. 04–5816. HARRIS, AKA BATES *v.* UNITED STATES. C. A. 5th Cir. Reported below: 96 Fed. Appx. 182;

No. 04–5826. POUNPANYA *v.* UNITED STATES. C. A. 9th Cir. Reported below: 97 Fed. Appx. 744;

No. 04–5830. VANBUREN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 97 Fed. Appx. 419;

No. 04–5831. RED ELK *v.* UNITED STATES. C. A. 8th Cir. Reported below: 368 F. 3d 1047;

No. 04–5837. LATERZA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 99 Fed. Appx. 886;

No. 04–5845. RADFORD *v.* UNITED STATES. C. A. 2d Cir. Reported below: 88 Fed. Appx. 448;

No. 04–5849. ECHEVARRIA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Reported below: 103 Fed. Appx. 665;

No. 04–5850. CUSHING *v.* UNITED STATES. C. A. 2d Cir. Reported below: 99 Fed. Appx. 269;

No. 04–5851. CHAPMAN *v.* UNITED STATES. C. A. 9th Cir. Reported below: 97 Fed. Appx. 170;

No. 04–5864. HUMPHREY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Reported below: 98 Fed. Appx. 771;

No. 04–5865. SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Reported below: 94 Fed. Appx. 222;

No. 04–5867. SUTTLES *v.* UNITED STATES. C. A. 6th Cir. Reported below: 100 Fed. Appx. 449;

No. 04–5879. PEREZ *v.* UNITED STATES. C. A. 7th Cir. Reported below: 100 Fed. Appx. 561;

No. 04–5881. REYES, AKA RODRIGUEZ *v.* UNITED STATES. C. A. 4th Cir. Reported below: 96 Fed. Appx. 903;

No. 04–5883. ROSEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Reported below: 94 Fed. Appx. 567;

No. 04–5887. COLUNGA-AMBRIZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 96 Fed. Appx. 959;

No. 04–5915. HOURSTON *v.* UNITED STATES. C. A. 8th Cir. Reported below: 97 Fed. Appx. 53;

No. 04–5917. VANORDEN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 99 Fed. Appx. 875;

No. 04–5931. BASKERVILLE *v.* UNITED STATES. C. A. 3d Cir. Reported below: 98 Fed. Appx. 185;

No. 04–5945. WEST *v.* UNITED STATES. C. A. 11th Cir. Reported below: 99 Fed. Appx. 879;

No. 04–5985. SAPP *v.* UNITED STATES. C. A. 11th Cir. Reported below: 362 F. 3d 1310;

No. 04–5987. SAPP *v.* UNITED STATES. C. A. 11th Cir. Reported below: 362 F. 3d 1310;

No. 04–5989. WINGATE *v.* UNITED STATES. C. A. 8th Cir. Reported below: 369 F. 3d 1028;

No. 04–6012. FLORES *v.* UNITED STATES. C. A. 9th Cir. Reported below: 99 Fed. Appx. 115;

No. 04–6015. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 99 Fed. Appx. 885;

No. 04–6033. MARTIN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 104 Fed. Appx. 151;

No. 04–6041. PADGETT *v.* UNITED STATES. C. A. 4th Cir. Reported below: 98 Fed. Appx. 189;

No. 04–6050. SALVADOR CHAVEZ *v.* UNITED STATES. C. A. 10th Cir. Reported below: 98 Fed. Appx. 806;

No. 04–6051. DARBOUZE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 99 Fed. Appx. 876;

No. 04–6057. WILSON *v.* UNITED STATES. C. A. 3d Cir. Reported below: 369 F. 3d 329;

No. 04–6062. FRANCISCO GONZALEZ, AKA QUINONES *v.* UNITED STATES. C. A. 8th Cir. Reported below: 365 F. 3d 656;

No. 04–6066. MILLS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 97 Fed. Appx. 506;

No. 04–6076. TATUM *v.* UNITED STATES. C. A. 5th Cir. Reported below: 101 Fed. Appx. 1;

No. 04–6088. KANATZAR *v.* UNITED STATES. C. A. 8th Cir. Reported below: 370 F. 3d 810;

No. 04–6094. TOLENTINO *v.* UNITED STATES. C. A. 9th Cir. Reported below: 98 Fed. Appx. 694;

No. 04–6095. LOCKLEAR *v.* UNITED STATES. C. A. 4th Cir.;

No. 04–6102. DEWITT *v.* UNITED STATES. C. A. 4th Cir. Reported below: 100 Fed. Appx. 145;

No. 04–6104. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Reported below: 96 Fed. Appx. 615;

No. 04–6119. JORDAN *v.* UNITED STATES. C. A. 7th Cir. Reported below: 370 F. 3d 703;

No. 04–6121. BRASS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 105 Fed. Appx. 574;

No. 04–6125. MACK *v.* UNITED STATES. C. A. 10th Cir. Reported below: 100 Fed. Appx. 752;

No. 04–6133. VAZQUEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 101 Fed. Appx. 467;

No. 04–6134. TODD *v.* UNITED STATES. C. A. 5th Cir. Reported below: 100 Fed. Appx. 248;

No. 04–6135. WEST *v.* UNITED STATES. C. A. 4th Cir. Reported below: 98 Fed. Appx. 259;

No. 04–6138. LEFEBVRE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 104 Fed. Appx. 152;

No. 04–6139. HUGHES *v.* UNITED STATES. C. A. 6th Cir. Reported below: 369 F. 3d 941;

No. 04–6154. CARPENTER *v.* UNITED STATES. C. A. 8th Cir. Reported below: 364 F. 3d 956;

No. 04–6160. BANUELOS ALVA *v.* UNITED STATES. C. A. 6th Cir. Reported below: 106 Fed. Appx. 314;

No. 04–6186. GILLIAN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 99 Fed. Appx. 477;

No. 04–6187. LUIS GARCIA *v.* UNITED STATES. C. A. 2d Cir. Reported below: 94 Fed. Appx. 17;

No. 04–6190. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 103 Fed. Appx. 866;

No. 04–6193. RHOINEY *v.* UNITED STATES. C. A. 10th Cir. Reported below: 94 Fed. Appx. 730;

No. 04–6196. CLAYTON *v.* UNITED STATES. C. A. 7th Cir. Reported below: 370 F. 3d 703;

No. 04–6198. COAXUM *v.* UNITED STATES. C. A. 11th Cir. Reported below: 107 Fed. Appx. 893;

No. 04–6199. DULANEY *v.* UNITED STATES. C. A. 6th Cir. Reported below: 100 Fed. Appx. 411;

No. 04–6200. LANG, AKA LEWIS, AKA KING *v.* UNITED STATES. C. A. 10th Cir. Reported below: 364 F. 3d 1210;

No. 04–6218. PLASIMOND *v.* UNITED STATES. C. A. 4th Cir. Reported below: 102 Fed. Appx. 283;

No. 04–6220. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 367 F. 3d 805;

No. 04–6221. DAIS, AKA SOUDIHA *v.* UNITED STATES. C. A. 9th Cir. Reported below: 101 Fed. Appx. 669;

No. 04–6224. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Reported below: 100 Fed. Appx. 305;

No. 04–6225. MOLDEN, AKA TROUTMAN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 112 Fed. Appx. 3;

No. 04–6228. VONDETTE *v.* UNITED STATES. C. A. 2d Cir. Reported below: 352 F. 3d 772 and 83 Fed. Appx. 394;

No. 04–6234. RAY *v.* UNITED STATES. C. A. 10th Cir. Reported below: 370 F. 3d 1039;

No. 04–6260. HAMPTON *v.* UNITED STATES. C. A. 10th Cir. Reported below: 100 Fed. Appx. 792;

No. 04–6264. GEDDES *v.* UNITED STATES. C. A. 3d Cir. Reported below: 98 Fed. Appx. 187;

No. 04–6266. GATEWOOD *v.* UNITED STATES. C. A. 10th Cir. Reported below: 370 F. 3d 1055;

No. 04–6273. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Reported below: 99 Fed. Appx. 737;

No. 04–6280. KENNEDY *v.* UNITED STATES. C. A. 5th Cir. Reported below: 99 Fed. Appx. 557;

No. 04–6299. SKELTON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 101 Fed. Appx. 89;

No. 04–6300. AGUILAR CAMACHO *v.* UNITED STATES. C. A. 9th Cir. Reported below: 109 Fed. Appx. 134;

No. 04–6322. DEJESUS ARBELAEZ *v.* UNITED STATES. C. A. 11th Cir. Reported below: 107 Fed. Appx. 892;

No. 04–6323. BARLOW *v.* UNITED STATES. C. A. 7th Cir. Reported below: 102 Fed. Appx. 51;

No. 04–6324. BONILLA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 97 Fed. Appx. 502;

No. 04–6326. WORLEY *v.* UNITED STATES. C. A. 6th Cir. Reported below: 100 Fed. Appx. 514;

No. 04–6340. CLARK *v.* UNITED STATES. C. A. 3d Cir. Reported below: 96 Fed. Appx. 816;

No. 04–6341. CASSANO *v.* UNITED STATES. C. A. 7th Cir. Reported below: 372 F. 3d 868;

No. 04–6366. DOUGLAS *v.* UNITED STATES. C. A. 6th Cir. Reported below: 100 Fed. Appx. 449;

No. 04–6378. BOLANOS-MUNOZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Reported below: 103 Fed. Appx. 665;

No. 04–6413. SPIELVOGEL *v.* UNITED STATES. C. A. 11th Cir. Reported below: 99 Fed. Appx. 881;

No. 04–6419. HAIRE *v.* UNITED STATES. C. A. D. C. Cir. Reported below: 371 F. 3d 833;

No. 04–6434. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 101 Fed. Appx. 972;

No. 04–6436. SIMMONS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 100 Fed. Appx. 600;

No. 04–6441. BORRA *v.* UNITED STATES. C. A. 9th Cir. Reported below: 101 Fed. Appx. 750;

No. 04–6446. DOTSON *v.* UNITED STATES. C. A. 7th Cir. Reported below: 102 Fed. Appx. 508;

No. 04–6454. RIGGS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 370 F. 3d 382;

No. 04–6461. YOUNG *v.* UNITED STATES. C. A. 4th Cir. Reported below: 100 Fed. Appx. 214;

No. 04–6471. ELLIS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 93 Fed. Appx. 497;

No. 04–6478. LYTLE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 242;

No. 04–6484. BIRKY *v.* UNITED STATES. C. A. 9th Cir. Reported below: 101 Fed. Appx. 701;

No. 04–6490. WATTS *v.* UNITED STATES. C. A. 9th Cir. Reported below: 102 Fed. Appx. 589;

No. 04–6500. ALANIZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 101 Fed. Appx. 512;

No. 04–6528. SALLIS *v.* UNITED STATES. C. A. 9th Cir. Reported below: 102 Fed. Appx. 617;

No. 04–6554. STOKES *v.* UNITED STATES. C. A. 4th Cir. Reported below: 89 Fed. Appx. 849;

No. 04–6564. BENNETT *v.* UNITED STATES. C. A. 11th Cir. Reported below: 368 F. 3d 1343;

No. 04–6573. HICKMAN, AKA SAUNDERS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 374 F. 3d 275;

No. 04–6574. HOUSTON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 107 Fed. Appx. 603;

No. 04–6587. GALLATIN *v.* UNITED STATES. C. A. 6th Cir. Reported below: 88 Fed. Appx. 54;

No. 04–6593. HUNT *v.* UNITED STATES. C. A. 6th Cir. Reported below: 86 Fed. Appx. 57;

No. 04–6628. NAGEL *v.* UNITED STATES. C. A. 11th Cir. Reported below: 112 Fed. Appx. 1;

No. 04–6642. KEYS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 97 Fed. Appx. 904;

No. 04–6651. JORDAN *v.* UNITED STATES. C. A. 5th Cir.;

No. 04–6652. O'GEORGIA *v.* UNITED STATES. C. A. 6th Cir. Reported below: 80 Fed. Appx. 439;

No. 04–6655. SOLACHE VALDOVINOS *v.* UNITED STATES. C. A. 9th Cir. Reported below: 103 Fed. Appx. 221;

No. 04–6667. BELTRAN-HERNANDEZ *v.* UNITED STATES. C. A. 8th Cir. Reported below: 373 F. 3d 905;

No. 04–6682. GARZA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 103 Fed. Appx. 528;

No. 04–6726. BOGGS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 100 Fed. Appx. 188;

No. 04–6747. TUBBS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 96 Fed. Appx. 257;

No. 04–6754. DIAZ-SANTANA *v.* UNITED STATES. C. A. 1st Cir.;

No. 04–6755. CHAVARRIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 377 F. 3d 475;

No. 04–6774. WORMSLEY, AKA WALLACE *v.* UNITED STATES. C. A. 3d Cir. Reported below: 368 F. 3d 331;

No. 04–6797. GARCIA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 107 Fed. Appx. 892;

No. 04–6798. HUNTER *v.* UNITED STATES. C. A. 5th Cir. Reported below: 105 Fed. Appx. 551;

No. 04–6811. THOMAS ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Reported below: 361 F. 3d 653;

No. 04–6813. STURGILL *v.* UNITED STATES. C. A. 11th Cir. Reported below: 107 Fed. Appx. 888;

No. 04–6823. CARTER *v.* UNITED STATES. C. A. 6th Cir. Reported below: 374 F. 3d 399;

No. 04–6829. GOLD *v.* UNITED STATES. C. A. 6th Cir. Reported below: 109 Fed. Appx. 736;

No. 04–6837. SOLESBEE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 94 Fed. Appx. 207;

No. 04–6844. ESCAMILLA-VASQUEZ *v.* UNITED STATES. C. A. 4th Cir. Reported below: 104 Fed. Appx. 285;

No. 04–6858. MEILLEUR *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 243;

No. 04–6861. MAYES *v.* UNITED STATES. C. A. 4th Cir. Reported below: 103 Fed. Appx. 495;

No. 04–6867. RICKS *v.* UNITED STATES. C. A. 3d Cir. Reported below: 96 Fed. Appx. 93;

No. 04–6868. SHAMBLIN *v.* UNITED STATES. C. A. 9th Cir. Reported below: 101 Fed. Appx. 243;

No. 04–6882. CHOICE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 102 Fed. Appx. 799;

No. 04–6892. TRAHAN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 107 Fed. Appx. 887;

No. 04–6900. LAWS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 102 Fed. Appx. 878;

No. 04–6921. VOLIS, AKA KLINE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 112 Fed. Appx. 4;

No. 04–6929. KELLER *v.* UNITED STATES. C. A. 7th Cir. Reported below: 376 F. 3d 713;

No. 04–6949. LOPERA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 112 Fed. Appx. 2;

No. 04–6956. SWASEY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 112 Fed. Appx. 5;

No. 04–6959. HAYNES *v.* UNITED STATES. C. A. 6th Cir. Reported below: 98 Fed. Appx. 499;

No. 04–6966. RICKS *v.* UNITED STATES. C. A. 3d Cir. Reported below: 96 Fed. Appx. 96;

No. 04–6970. SCROGGINS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 379 F. 3d 233;

No. 04–7042. PADMORE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 245;

No. 04–7045. WELCH *v.* UNITED STATES. C. A. 7th Cir. Reported below: 368 F. 3d 970;

No. 04–7047. SMITH *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 280;

No. 04–7065. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 86 Fed. Appx. 728;

No. 04–7096. OLLIVIERRE, AKA BRIDGES *v.* UNITED STATES. C. A. 4th Cir. Reported below: 378 F. 3d 412;

No. 04–7131. LEISURE *v.* UNITED STATES. C. A. 8th Cir. Reported below: 377 F. 3d 910;

No. 04–7135. THORN *v.* UNITED STATES. C. A. 8th Cir. Reported below: 375 F. 3d 679;

No. 04–7142. BALDWIN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 252;

No. 04–7158. PAYNE *v.* UNITED STATES. C. A. 8th Cir. Reported below: 377 F. 3d 811;

No. 04–7168. GANN *v.* UNITED STATES. C. A. 5th Cir.;

No. 04–7171. GRASS, AKA GRASSO *v.* UNITED STATES. C. A. 3d Cir. Reported below: 93 Fed. Appx. 408;

No. 04–7179. HERRERA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 248;

No. 04–7182. HARRIS *v.* UNITED STATES. C. A. 4th Cir.;

No. 04–7184. DALE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 374 F. 3d 321;

No. 04–7206. MALVEAUX *v.* UNITED STATES. C. A. 5th Cir. Reported below: 104 Fed. Appx. 430;

No. 04–7207. LOVERSON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 111 Fed. Appx. 831;

No. 04–7220. PRADO-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 105 Fed. Appx. 631;

No. 04–7223. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 104 Fed. Appx. 434;

No. 04–7235. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 104 Fed. Appx. 433;

No. 04–7242. SMITH *v.* UNITED STATES. C. A. 5th Cir. Reported below: 108 Fed. Appx. 873;

No. 04–7259. CHARLES-SANCHEZ *v.* UNITED STATES. C. A. 11th Cir. Reported below: 112 Fed. Appx. 3;

No. 04–7270. OSAMOR *v.* UNITED STATES. C. A. 5th Cir. Reported below: 107 Fed. Appx. 438;

No. 04–7281. GRAY *v.* UNITED STATES. C. A. 6th Cir. Reported below: 109 Fed. Appx. 74;

No. 04–7282. FERRELL, AKA SHAWN *v.* UNITED STATES. C. A. 2d Cir. Reported below: 380 F. 3d 102 and 106 Fed. Appx. 750;

No. 04–7289. MARQUEZ-GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 105 Fed. Appx. 626;

No. 04–7291. DUNLAP *v.* UNITED STATES. C. A. 6th Cir. Reported below: 110 Fed. Appx. 532;

No. 04–7292. NICHOLS, AKA JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Reported below: 374 F. 3d 959;

No. 04–7319. CASTANEDA-BARRIENTOS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 108 Fed. Appx. 878;

No. 04–7328. MENDEZ *v.* UNITED STATES. C. A. 4th Cir. Reported below: 102 Fed. Appx. 266;

No. 04–7342. EASTWOOD, AKA SPRINGER *v.* UNITED STATES. C. A. 9th Cir. Reported below: 107 Fed. Appx. 808;

No. 04–7362. BASS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 104 Fed. Appx. 598;

No. 04–7370. LAWRENCE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 112 Fed. Appx. 5;

No. 04–7373. DAVIS, AKA BENFORD *v.* UNITED STATES. C. A. 6th Cir. Reported below: 107 Fed. Appx. 596;

No. 04–7386. CHAVEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 105 Fed. Appx. 641;

No. 04–7409. SHIPMAN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 107 Fed. Appx. 354;

No. 04–7428. DOBBS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 105 Fed. Appx. 132;

No. 04–7438. BRIGHTWELL *v.* UNITED STATES. C. A. 3d Cir. Reported below: 104 Fed. Appx. 823;

No. 04–7442. KYSER *v.* UNITED STATES. C. A. 7th Cir. Reported below: 102 Fed. Appx. 51;

No. 04–7445. LYNCH *v.* UNITED STATES. C. A. 4th Cir. Reported below: 102 Fed. Appx. 299;

No. 04–7455. CUELLAR *v.* UNITED STATES. C. A. 5th Cir. Reported below: 105 Fed. Appx. 617;

No. 04–7474. JONES *v.* UNITED STATES. C. A. 6th Cir. Reported below: 107 Fed. Appx. 601;

No. 04–7499. GRIMES *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 241;

No. 04–7501. HILL *v.* UNITED STATES. C. A. 4th Cir.;

No. 04–7508. ONE MALE JUVENILE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 103 Fed. Appx. 493;

No. 04–7536. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 109 Fed. Appx. 518;

No. 04–7539. GRIJALVA-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 108 Fed. Appx. 157;

No. 04–7547. SANTOS PEREZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 102 Fed. Appx. 388;

No. 04–7562. COYNE *v.* UNITED STATES. C. A. 1st Cir. Reported below: 114 Fed. Appx. 5;

No. 04–7569. SANTILLANA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 109 Fed. Appx. 665;

No. 04–7570. REESE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 382 F. 3d 1308;

No. 04–7575. SOLER *v.* UNITED STATES. C. A. 11th Cir. Reported below: 107 Fed. Appx. 182;

No. 04–7590. ORR *v.* UNITED STATES. C. A. 4th Cir. Reported below: 106 Fed. Appx. 163;

No. 04–7612. GAINES *v.* UNITED STATES. C. A. 6th Cir. Reported below: 105 Fed. Appx. 682;

No. 04–7618. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 105 Fed. Appx. 578;

No. 04–7634. SMITH *v.* UNITED STATES. C. A. 5th Cir. Reported below: 110 Fed. Appx. 380;

No. 04–7644. KING *v.* UNITED STATES. C. A. 4th Cir. Reported below: 113 Fed. Appx. 504;

No. 04–7646. SALINAS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 108 Fed. Appx. 216;

No. 04–7647. SANCHEZ-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Reported below: 104 Fed. Appx. 670;

No. 04–7648. SAVILLA *v.* UNITED STATES. C. A. 4th Cir.;

No. 04–7656. LEATHAM *v.* UNITED STATES. C. A. 8th Cir. Reported below: 105 Fed. Appx. 132;

No. 04–7667. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 96 Fed. Appx. 946;

No. 04–7681. PETTIETTE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 105 Fed. Appx. 578;

No. 04–7700. HOLDER *v.* UNITED STATES. C. A. 5th Cir. Reported below: 109 Fed. Appx. 673;

No. 04–7701. FLORES *v.* UNITED STATES. C. A. 2d Cir. Reported below: 109 Fed. Appx. 463;

No. 04–7712. LAUREL *v.* UNITED STATES. C. A. 6th Cir. Reported below: 103 Fed. Appx. 875;

No. 04–7724. MURRAY *v.* UNITED STATES. C. A. 2d Cir. Reported below: 108 Fed. Appx. 22;

No. 04–7728. AUGUSTIN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 102 Fed. Appx. 771;

No. 04–7741. HEARNE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 102 Fed. Appx. 321;

No. 04–7759. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 245;

No. 04–7760. KEMP *v.* UNITED STATES. C. A. 11th Cir.;

No. 04–7779. GRAHAM *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 242;

No. 04–7780. HOOKER *v.* UNITED STATES. C. A. 4th Cir. Reported below: 101 Fed. Appx. 906;

No. 04–7793. BRYANT *v.* UNITED STATES. C. A. 5th Cir.;

No. 04–7816. DOCKERY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 120 Fed. Appx. 785;

No. 04–7823. MCCRAY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 982;

No. 04–7827. STERLING *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 978;

No. 04–7834. BROWN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 252;

No. 04–7848. PERALTA-FLORES, AKA PERALTA, AKA SALGADO *v.* UNITED STATES. C. A. 9th Cir. Reported below: 109 Fed. Appx. 962; and

No. 04–7851. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Reported below: 116 Fed. Appx. 727. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker, ante,* p. 220.

No. 04–6359. AKINS *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Booker, ante,* p. 220. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 102 Fed. Appx. 88.

No. 03–9402. RIDEOUT *v.* UNITED STATES, 542 U. S. 939;

No. 03–10262. JIMENEZ-VELASCO *v.* UNITED STATES; GONZALEZ *v.* UNITED STATES; HINOJOSA-AGUIRRE *v.* UNITED STATES; DEL BOSQUE *v.* UNITED STATES; LOZANO-TAMEZ *v.* UNITED STATES; QUIROZ-ESCOBEDO *v.* UNITED STATES; and CAMPOS MADRIGAL *v.* UNITED STATES, 542 U. S. 911;

No. 03–10272. NEWSOME *v.* UNITED STATES; MARTIN *v.* UNITED STATES; CHIMNEY *v.* UNITED STATES; SONGALIA FLORES *v.* UNITED STATES; VILLARREAL-MEDINA *v.* UNITED STATES; ABNEY *v.* UNITED STATES; GUERRERO *v.* UNITED STATES; AGUILAR-CORTEZ *v.* UNITED STATES; AVILA-CHAVEZ *v.* UNITED STATES; HERNANDEZ-HERNANDEZ *v.* UNITED STATES; DE LOS SANTOS *v.* UNITED STATES; MEDINA-TENIENTE *v.* UNITED STATES; and DE LUNA-VIGIL *v.* UNITED STATES, 542 U. S. 912;

No. 03–10275. EPPS *v.* UNITED STATES, 542 U. S. 912;

No. 03–10408. VAN ALSTYNE *v.* UNITED STATES, 542 U. S. 926;

No. 03–10416. CARBAJAL-MARTINEZ *v.* UNITED STATES, 542 U. S. 927;

No. 03–10417. MCDONNELL *v.* UNITED STATES, 542 U. S. 915;

No. 03–10424. PEARSON *v.* UNITED STATES, 542 U. S. 927;

No. 03–10427. SALAS *v.* UNITED STATES; and TORRES-VASQUEZ *v.* UNITED STATES, 542 U. S. 927;

No. 03–10525. CAMPBELL *v.* UNITED STATES, 542 U. S. 931; and

No. 03–10530. VALADEZ SOTO *v.* UNITED STATES, 542 U. S. 931. Petitions for rehearing granted. Orders denying petitions for writs of certiorari vacated. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, *ante*, p. 220.

No. 03–10490. CRISTON *v.* UNITED STATES; PERALES *v.* UNITED STATES; GUERRA *v.* UNITED STATES; and SALINAS *v.* UNITED STATES, 542 U. S. 930. Petition for rehearing as to Felix Guerra granted. Order denying petition for writ of certiorari as to Felix Guerra vacated. Motion of petitioner Felix Guerra for leave to proceed *in forma pauperis* granted. Certiorari as to Felix Guerra granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Booker*, *ante*, p. 220. Petitions for rehearing as to Jesse Perales, Miguel Salinas, and Gary Criston denied.

No. 04–6588. IN RE BECKLEY. Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for writ of mandamus denied. Treating the papers submitted as a petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Booker*, *ante*, p. 220.

Certiorari Dismissed

No. 04–7405. REED *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Certificate Dismissed

No. 04–59. UNITED STATES *v.* PENARANDA ET AL. Questions certified by the United States Court of Appeals for the Second Circuit dismissed. Reported below: 375 F. 3d 238.

Miscellaneous Orders

No. 04M41. PENDER *v.* UNION OF C. S. E. A. ET AL.;

No. 04M42. BEAN *v.* UNITED STATES POSTAL SERVICE ET AL.; and

No. 04M43. HENRY *v.* DEPARTMENT OF COMMERCE ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 03–1566. ORFF ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 924.] Motion of respondent Westlands Water District for divided argument granted. Motion of Pacific Legal Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 04–163. LINGLE, GOVERNOR OF HAWAII, ET AL. *v.* CHEVRON U. S. A. INC. C. A. 9th Cir. [Certiorari granted, *ante*, p. 924.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–277. NATIONAL CABLE & TELECOMMUNICATIONS ASSN. ET AL. *v.* BRAND X INTERNET SERVICES ET AL.; and

No. 04–281. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* BRAND X INTERNET SERVICES ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1018.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 04–6604. JONES *v.* BIRKETT, WARDEN. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1019] denied.

No. 04–6638. SMITH *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1019] denied.

No. 04–7297. RUIZ RIVERA *v.* KPMG PEAT MARWICK ET AL. C. A. 1st Cir.;

No. 04–7317. CARNOHAN *v.* NEWCOMB. Sup. Ct. Cal.; and

No. 04–7697. GILMORE *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until February 14, 2005, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 04–7884. IN RE CARTER. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of

habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 04–7308. IN RE GEORGE; and

No. 04–7378. IN RE NIMMONS. Petitions for writs of mandamus denied.

No. 04–7414. IN RE WASHINGTON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 03–10745. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–10879. OAKMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 901.

No. 03–10911. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–250. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 364 F. 3d 727.

No. 04–331. ORANDELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 74 Fed. Appx. 126.

No. 04–335. DIFRISCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 74 Fed. Appx. 126.

No. 04–429. ROSE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ET AL. *v.* PLANNED PARENTHOOD OF SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 361 F. 3d 786.

No. 04–529. SUPERIOR PROTECTION, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 561.

No. 04–540. BAYOIL SUPPLY & TRADING LTD. *v.* GULF INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–542. ANGLE, NEVADA STATE ASSEMBLY MEMBER, ET AL. *v.* LEGISLATURE OF THE STATE OF NEVADA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 90.

No. 04–555. LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC., ET AL. *v.* CITY OF LONG BRANCH, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 100 Fed. Appx. 70.

No. 04–561. S. L. *v.* PRINCE WILLIAM COUNTY SCHOOL BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 908.

No. 04–590. CLAUDIO-GOTAY ET AL. *v.* BECTON DICKINSON CARIBE, LTD., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 375 F. 3d 99.

No. 04–595. MCNICHOLL *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied.

No. 04–598. FOGERTY ET AL. *v.* MGM GROUP HOLDINGS CORP., INC., DBA MGM UNIVERSAL MUSIC GROUP, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 379 F. 3d 348.

No. 04–658. MCINERNEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 74 Fed. Appx. 126.

No. 04–665. PHONECARDS R US, INC., ET AL. *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 360 S. C. 49, 600 S. E. 2d 61.

No. 04–666. WASHINGTON WATER JET WORKERS ASSN. ET AL. *v.* YARBROUGH, IN HIS OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE DIVISION OF CORRECTIONAL INDUSTRIES, ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 151 Wash. 2d 470, 90 P. 3d 42.

No. 04–667. WHITE-BATTLE *v.* DEMOCRATIC PARTY OF VIRGINIA ET AL. Sup. Ct. Va. Certiorari denied.

No. 04–672. SANK *v.* CITY UNIVERSITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 761.

No. 04–675. DETROIT INTERNATIONAL BRIDGE CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 361 F. 3d 305.

No. 04–681. LINDQUIST, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF LINDQUIST *v.* BUCKINGHAM TOWNSHIP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 106 Fed. Appx. 768.

No. 04–684. TEN TAXPAYER CITIZENS GROUP ET AL. *v.* CAPE WIND ASSOCIATES, LLC. C. A. 1st Cir. Certiorari denied. Reported below: 373 F. 3d 183.

No. 04–688. SHAW *v.* SHAW. Sup. Ct. Fla. Certiorari denied. Reported below: 879 So. 2d 623.

No. 04–690. CALLICO ET UX. *v.* CITY OF BELLEVILLE, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 746.

No. 04–691. THOMPSON *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 9th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 604.

No. 04–726. MOYE, O'BRIEN, O'ROURKE, HOGAN & PICKERT *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 251.

No. 04–752. GUZMAN-SANTANA *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 493.

No. 04–757. BUSH, GOVERNOR OF FLORIDA *v.* SCHIAVO, GUARDIAN OF SCHIAVO. Sup. Ct. Fla. Certiorari denied. Reported below: 885 So. 2d 321.

No. 04–764. BRENNAN ET UX. *v.* MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY ET AL. Ct. App. Mich. Certiorari denied.

No. 04–773. MCCURDY *v.* ARKANSAS STATE POLICE. C. A. 8th Cir. Certiorari denied. Reported below: 375 F. 3d 762.

No. 04–777. WIMBUSH-BOWLES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. *v.* GTE SERVICE CORPORATION PLAN FOR EMPLOYEES' PENSIONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 780.

No. 04–850. KAHL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 200.

No. 04–877. DONAHUE ET AL. *v.* PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM OF PENNSYLVANIA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 580 Pa. 14, 858 A. 2d 1162.

No. 04–5025. REED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5054. ISRAEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5091. JOSEPH, AKA SANDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 248.

No. 04–5337. SANTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–5485. HAMILTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 56.

No. 04–5588. KREIGER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–5601. BARNES *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 904.

No. 04–5628. AKIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–5683. PATRICK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–5751. SHAW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–5926. ESTRADA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 04–5943. HUBBARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–5950. VIZZINI *v.* HUTCHINSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 157.

No. 04–5976. MILLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–6014. BURNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–6078. CROSBY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–6148. PEREZ, AKA ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6158. CHAVEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 04–6181. PADILLA, AKA CRUZ, AKA ROQUE PADILLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–6279. KING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6307. LAZARO CONTRERAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–6438. KENNEDY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 372 F. 3d 686.

No. 04–6477. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 373 F. 3d 561.

No. 04–6683. HENDON *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 769.

No. 04–6734. GAVIN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 891 So. 2d 907.

No. 04–6792. CARTWRIGHT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 545.

No. 04–6913. STEPHANATOS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 868.

No. 04–6945. COLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 887.

No. 04–6950. ORTIZ-ROSAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 883.

No. 04–6980. STEPHENS *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied.

No. 04–7205. MATCHETT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 380 F. 3d 844.

No. 04–7210. SIMMONS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 360 S. C. 33, 599 S. E. 2d 448.

No. 04–7304. GEIDEL *v.* PENNSYLVANIA BOARD OF PROBATION AND PAROLE. Commw. Ct. Pa. Certiorari denied.

No. 04–7305. FRENCH *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 04–7306. GOODRIDGE *v.* LAUGHLIN ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–7311. FERNANDEZ *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7312. GIBBONS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7315. ROBINSON *v.* ARTUS, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 8 App. Div. 3d 794, 777 N. Y. S. 2d 920.

No. 04–7316. CONE ET UX., ON BEHALF OF CONE *v.* RANDOLPH COUNTY SCHOOLS. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 731.

No. 04–7330. FOSTER *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–7331. GOODWIN *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7334. GRIGGER *v.* TRAVIS. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 6 App. Div. 3d 1222, 775 N. Y. S. 2d 707.

No. 04–7336. GREEN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 934.

No. 04–7338. GOODSON *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 906.

No. 04–7339. IVES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 04–7340. DONG CHUNG *v.* KPMG LLP ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 576.

No. 04–7341. CHEESEMAN *v.* BANTA. C. A. 9th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 110.

No. 04–7345. GODINEZ *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7346. GAYLE *v.* ARTUS, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–7347. GRAVES *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–7350. FAIRFAX *v.* BUTLER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7354. MOORE *v.* MICHIGAN. Cir. Ct. Muskegon County, Mich. Certiorari denied.

No. 04–7358. BELEI *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 813.

No. 04–7359. MCDANIEL *v.* SHERRER, ADMINISTRATOR, NORTHERN STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7363. NEWMAN *v.* MICHIGAN. Cir. Ct. Livingston County, Mich. Certiorari denied.

No. 04–7368. SILVERBRAND *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 195.

No. 04–7374. PANDOLFI *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied.

No. 04–7377. MILLER *v.* VANNATTA, SUPERINTENDENT, MIAMI CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 04–7379. NIKSICH *v.* COTTON, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY, ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 810 N. E. 2d 1003.

No. 04–7388. DRIVER *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 192 Ore. App. 395, 86 P. 3d 53.

No. 04–7391. BRIGGS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–7392. BURRELL *v.* VIRGINIA DEPARTMENT OF MOTOR VEHICLES. Sup. Ct. Va. Certiorari denied.

No. 04–7394. VANHOUSEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–7398. BUDNICK *v.* HAMPDEN COUNTY HOUSE OF CORRECTION. C. A. 5th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 601.

No. 04–7400. STEVENSON *v.* BOYETTE, SUPERINTENDENT, NASH CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 821.

No. 04–7403. ROBLYER *v.* PENNSYLVANIA DEPARTMENT OF CORRECTIONS. Commw. Ct. Pa. Certiorari denied.

No. 04–7404. SANCHEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 04–7406. BEGORDIS *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 04–7408. WILLIS *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–7410. SANDERS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 881 So. 2d 1114.

No. 04–7412. WILLIAMS *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7416. WEAVER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 255.

No. 04–7418. HALL *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 04–7440. ALLEN *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 97 Fed. Appx. 346.

No. 04–7463. PULLEY *v.* RUBENSTEIN, COMMISSIONER, WEST VIRGINIA DIVISION OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 755.

No. 04–7468. MADURA *v.* LONGWOOD ATHLETIC CLUB, INC. Cir. Ct. Sarasota County, Fla. Certiorari denied.

No. 04–7488. REYES *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7491. BOWSER *v.* BLACKETTER, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 04–7493. MOORE *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–7504. THOMPSON *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–7516. DE MELO *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 112 Fed. Appx. 31.

No. 04–7526. BANSAL *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 535.

No. 04–7532. FARSHIDI *v.* NORFOLK STATE UNIVERSITY. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 839.

No. 04–7549. MATA *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 266 Neb. 668, 668 N. W. 2d 448.

No. 04–7556. JACKSON *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 61 Mass. App. 1111, 810 N. E. 2d 862.

No. 04–7619. WILLIAMS, AKA FRANKLIN *v.* DINGLE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 04–7625. MOSS *v.* TRENT, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 04–7696. HADDAD *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 413.

No. 04–7704. GOMES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 387 F. 3d 157.

No. 04–7721. DAWSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 732.

No. 04–7725. NUNEZ-RODELO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 378 F. 3d 877 and 110 Fed. Appx. 811.

No. 04–7729. BERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 757.

No. 04–7730. BAEZ-LEON *v.* UNITED STATES; GARCIA-RAMIREZ *v.* UNITED STATES; LARIOS-ANDRADE *v.* UNITED STATES; YANEZ-GOVEA *v.* UNITED STATES; RAMIREZ-YANEZ *v.* UNITED STATES; and MARTINEZ-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 468 (fourth judgment) and 469 (sixth judgment); 111 Fed. Appx. 331 (fifth judgment) and 333 (third judgment); 112 Fed. Appx. 321 (first judgment) and 346 (second judgment).

No. 04–7737. MELVIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 603.

No. 04–7739. GRANT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 856 A. 2d 1131.

No. 04–7742. HOWARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 386.

No. 04–7744. HOWARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 183.

No. 04–7745. HYLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–7751. ROSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7761. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 319.

No. 04–7773. DE AZA-PAEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–7776. AJAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 150.

No. 04–7777. STAFFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 418.

No. 04–7778. BUENO-VARGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 383 F. 3d 1104.

No. 04–7786. ELIZALDE-CASARES *v.* UNITED STATES (Reported below: 111 Fed. Appx. 340); PEQUE-PEREZ *v.* UNITED STATES (112 Fed. Appx. 350); REYES-MANCIAS *v.* UNITED STATES (110 Fed. Appx. 447); REYES-PASCUAL *v.* UNITED STATES (110 Fed. Appx. 444); SIERRA-MADRIGAL *v.* UNITED STATES (110 Fed. Appx. 452); DIAZ-SANCHEZ *v.* UNITED STATES (110 Fed. Appx. 444); GARCIA-LOPEZ *v.* UNITED STATES (110 Fed. Appx. 436); COBOS-PEREZ *v.* UNITED STATES (110 Fed. Appx. 435); GOMEZ-DELGADO *v.* UNITED STATES (110 Fed. Appx. 443); HERRERA-BARAJAS *v.* UNITED STATES (111 Fed. Appx. 327); JIMENEZ LOPEZ *v.* UNITED STATES (111 Fed. Appx. 747); QUIRINO *v.* UNITED STATES (111 Fed. Appx. 338); RODRIGUEZ-MEDINA *v.* UNITED STATES (110 Fed. Appx. 441); OLALDE-SERNA *v.* UNITED STATES (110 Fed. Appx. 448); SANTOS-HERNANDEZ *v.* UNITED STATES (111 Fed. Appx. 339); HERNANDEZ RIVERA *v.* UNITED STATES (110 Fed. Appx. 420); GOMEZ-VARGAS *v.* UNITED STATES (111 Fed. Appx. 741); and ESTRADA-RODRIGUEZ *v.* UNITED STATES (113 Fed. Appx. 1). C. A. 5th Cir. Certiorari denied.

No. 04–7791. SANDRIDGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 385 F. 3d 1032.

No. 04–7800. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 375 F. 3d 1285.

No. 04–7806. WAKEFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 817.

No. 04–7809. DELEON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 859 A. 2d 652.

No. 04–7811. ESCOVAR-MADRID, AKA VALAZGUEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 641.

No. 04–7812. VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 979.

No. 04–7813. QUINTANA-QUINTANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 227.

No. 04–7815. CLARK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 110 Fed. Appx. 245.

No. 04–7817. CUNNINGHAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 110 Fed. Appx. 238.

No. 04–7818. JOHNSON, AKA WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 108 Fed. Appx. 741.

No. 04–7819. MARTINEZ-CARRILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 701.

No. 04–7821. LAIJA-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 411.

No. 04–7825. RULE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7829. STAMPER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 833.

No. 04–7830. JUAREGUI-DURAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 982.

No. 04–7833. BUTLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7838. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7841. DOMINGUEZ-OCHOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 386 F. 3d 639.

No. 04–7842. CASTANEDA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 209.

No. 04–7845. LOTT *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 13.

No. 04–467. PEARSON EDUCATION, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 373 F. 3d 127.

No. 04–677. DAILEY *v.* BANK OF AMERICA. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 106 Fed. Appx. 533.

No. 04–7355. LIGGON, AKA LIGGON-REDDING *v.* NATIONAL CITY MORTGAGE. Super. Ct. Pa. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 832 A. 2d 551.

No. 04–7447. RUIMVELD *v.* BIRKETT, WARDEN. C. A. 6th Cir. Certiorari before judgment denied.

Rehearing Granted. (See Nos. 03–1326, 03–1434, 03–9402, 03–10262, 03–10272, 03–10275, 03–10408, 03–10416, 03–10417, 03–10424, 03–10427, 03–10490, 03–10525, and 03–10530, *supra.*)

Rehearing Denied. (See also No. 03–10490, *supra.*)

No. 03–1624. HELDT *v.* MICHIGAN, *ante*, p. 816;
No. 03–10462. HILL *v.* UNITED STATES, 542 U. S. 928;
No. 03–10692. MILLER *v.* UNITED STATES, *ante*, p. 845;
No. 03–11007. ARORA *v.* UNITED STATES, *ante*, p. 863;
No. 04–197. KILCULLEN *v.* LEWIS ET AL., *ante*, p. 1000;
No. 04–493. NETZER *v.* WISCONSIN, *ante*, p. 1003;
No. 04–5703. PARIS *v.* SOUTHWESTERN BELL TELEPHONE CO., *ante*, p. 1005;

No. 04–5908. SCOTT *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, *ante*, p. 1022;

No. 04–6009. BROWN *v.* DORMIRE, SUPERINTENDENT, MISSOURI STATE PENITENTIARY, *ante*, p. 962;

No. 04–6170. IN RE SCRUGGS, *ante*, p. 978;

No. 04–6275. WALKER *v.* FAMILY INDEPENDENCE AGENCY, *ante*, p. 991;

No. 04–6406. SANDERS *v.* MARYLAND ET AL., *ante*, p. 1006;

No. 04–6423. IN RE NORMAN, *ante*, p. 978;

No. 04–6594. PERKINS *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, ET AL., *ante*, p. 1024;

No. 04–6613. ANDERSON *v.* SIZER, COMMISSIONER, MARYLAND DIVISION OF CORRECTION, ET AL., *ante*, p. 1024;

No. 04–6614. BURTON *v.* CLEVELAND OHIO EMPOWERMENT ZONE ET AL., *ante*, p. 1024;

No. 04–6662. DUNCAN *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS, ET AL., *ante*, p. 1025;

No. 04–6927. IN RE JOHNSON, *ante*, p. 999; and

No. 04–7069. ROGERS *v.* UNITED STATES, *ante*, p. 1029. Petitions for rehearing denied.

JANUARY 25, 2005

Dismissal Under Rule 46

No. 03–1443. HILL *v.* LOCKHEED MARTIN LOGISTICS MANAGEMENT, INC. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 354 F. 3d 277.

Miscellaneous Order

No. 04–8320 (04A653). IN RE KUNKLE. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 04–8311 (04A649). KUNKLE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STE-

VENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution.

No. 04–8312 (04A648). CARR *v.* SCHOFIELD, WARDEN. Super. Ct. Butts County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 04–8319 (04A652). KUNKLE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 04–8321 (04A651). KUNKLE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied

No. 92–8908 (04A650). KUNKLE *v.* TEXAS, 510 U. S. 840; and No. 04–7271 (04A654). KUNKLE *v.* TEXAS, *ante*, p. 1039. Applications for stays of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Motions for leave to file petitions for rehearing denied.

JANUARY 26, 2005

Miscellaneous Order

No. 04A635 (04–70). EXXON MOBIL CORP. *v.* ALLAPATTAH SERVICES, INC., ET AL. C. A. 11th Cir. Application to stay execution of judgment pending disposition of the writ of certiorari, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JANUARY 27, 2005

Miscellaneous Orders

No. 04A647. MISSIONARY SOCIETY OF CONNECTICUT *v.* BOARD OF PARDONS AND PAROLES. Application for stay of execution of sentence of death, presented to JUSTICE GINSBURG, and by her referred to the Court, denied.

No. 04A656. LANTZ, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTIONS, ET AL. *v.* ROSS, BY AND THROUGH HIS NEXT FRIEND, SMYTH. Application to vacate the stay of execution of sentence of death entered by the United States District Court for the District of Connecticut on January 24, 2005, presented to JUSTICE GINSBURG, and by her referred to the Court, granted. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would deny the application to vacate the stay of execution.

JANUARY 28, 2005

Miscellaneous Orders

No. 04A663. RELL ET AL. *v.* ROSS. Application to vacate the temporary stay entered by the United States Court of Appeals for the Second Circuit on January 28, 2005, presented to JUSTICE GINSBURG, and by her referred to the Court, granted.

No. 04A665. ROSS *v.* RELL ET AL. Application for stay of execution of sentence of death, or, in the alternative, for a temporary restraining order, presented to JUSTICE GINSBURG, and by her referred to the Court, denied.

FEBRUARY 17, 2005

Dismissals Under Rule 46

No. 04–7918. BELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 109 Fed. Appx. 772.

No. 04–8256. MULCAHY *v.* UNITED STATES. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 116 Fed. Appx. 242.

Miscellaneous Order

No. 04–8702 (04A714). IN RE BAGWELL. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

FEBRUARY 18, 2005

Miscellaneous Orders

No. 03–932. DURA PHARMACEUTICALS, INC., ET AL. *v.* BROUDO ET AL. C. A. 9th Cir. [Certiorari granted, 542 U. S. 936.] Mo-

tion of petitioners for leave to file supplemental brief after argument granted.

No. 03–1388. SPECTOR ET AL. *v.* NORWEGIAN CRUISE LINE LTD. C. A. 5th Cir. [Certiorari granted, 542 U. S. 965.] Motions of the Acting Solicitor General and the Commonwealth of the Bahamas and the Bahama Maritime Authority for leave to participate in oral argument as *amici curiae* and for divided argument granted.

No. 03–1500. VAN ORDEN *v.* PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 923.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motions of the Foundation for Moral Law, Inc., and Faith and Action et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 03–1693. MCCREARY COUNTY, KENTUCKY, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 924.] Motion of Faith and Action et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 04–70. EXXON MOBIL CORP. *v.* ALLAPATTAH SERVICES, INC., ET AL. C. A. 11th Cir.; and

No. 04–79. DEL ROSARIO ORTEGA ET AL. *v.* STAR-KIST FOODS, INC. C. A. 1st Cir. [Certiorari granted, *ante*, p. 924.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 04–108. KELO ET AL. *v.* CITY OF NEW LONDON, CONNECTICUT, ET AL. Sup. Ct. Conn. [Certiorari granted, 542 U. S. 965.] Motion of Connecticut for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

FEBRUARY 22, 2005

Certiorari Granted—Vacated and Remanded

No. 03–1224. ILLINOIS *v.* HARRIS. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further

consideration in light of *Illinois* v. *Caballes*, *ante*, p. 405. Reported below: 207 Ill. 2d 515, 802 N. E. 2d 219.

No. 04–852. ASHLOCK *v.* UNITED STATES. C. A. 5th Cir. Reported below: 105 Fed. Appx. 581; and

No. 04–882. RAITHATHA *v.* UNITED STATES. C. A. 6th Cir. Reported below: 385 F. 3d 1013. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, *ante*, p. 220.

No. 04–7710. SMITH *v.* UNITED STATES. C. A. 8th Cir. Reported below: 378 F. 3d 754;

No. 04–7731. AGNEW *v.* UNITED STATES. C. A. 3d Cir. Reported below: 385 F. 3d 288;

No. 04–7740. HOPPER *v.* UNITED STATES. C. A. 6th Cir. Reported below: 384 F. 3d 252;

No. 04–7758. MALLORY, AKA MUSHEEN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 241;

No. 04–7762. MORTON *v.* UNITED STATES. C. A. 11th Cir. Reported below: 364 F. 3d 1300;

No. 04–7774. ELIZARRARAZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 263;

No. 04–7784. HICKS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 107 Fed. Appx. 892;

No. 04–7805. WALKER *v.* UNITED STATES. C. A. 4th Cir. Reported below: 100 Fed. Appx. 220;

No. 04–7832. GARCIA-BELTRAN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 279;

No. 04–7836. PEREZ-GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 114 Fed. Appx. 596;

No. 04–7839. JUI-TENG LIN *v.* UNITED STATES. C. A. 2d Cir. Reported below: 85 Fed. Appx. 234;

No. 04–7847. MURIETTA MALDONADO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 253;

No. 04–7866. SEARS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 122 Fed. Appx. 986;

No. 04–7871. BOLDING *v.* UNITED STATES; GONZALEZ-SANDOVAL *v.* UNITED STATES; COVARRUBIAS *v.* UNITED STATES; DE LEON-ROCHA *v.* UNITED STATES; LOPEZ-GUZMAN *v.* UNITED STATES; GUERRA *v.* UNITED STATES; and ROMERO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 110 Fed. Appx. 389 (first judgment), 452 (sixth judgment), and 454 (fourth judgment);

111 Fed. Appx. 330 (seventh judgment), 335 (third judgment), 336 (fifth judgment), and 339 (second judgment);

No. 04–7876. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 123 Fed. Appx. 385;

No. 04–7877. MCARTHUR *v.* UNITED STATES. C. A. 11th Cir. Reported below: 122 Fed. Appx. 987;

No. 04–7885. DICLEMENTE *v.* UNITED STATES. C. A. 4th Cir.;

No. 04–7935. MOSLEY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 123 Fed. Appx. 387;

No. 04–7958. VMON, AKA SLACK *v.* UNITED STATES. C. A. 11th Cir. Reported below: 122 Fed. Appx. 985;

No. 04–7970. ANTHONY *v.* UNITED STATES. C. A. 3d Cir. Reported below: 112 Fed. Appx. 810;

No. 04–8000. CARRIE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 107 Fed. Appx. 892;

No. 04–8001. DUARTE-BENITEZ *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 269;

No. 04–8039. GARCIA-CORONADO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 108 Fed. Appx. 939;

No. 04–8085. SMITH *v.* UNITED STATES. C. A. 11th Cir. Reported below: 123 Fed. Appx. 386;

No. 04–8124. GONZALEZ-OROZCO *v.* UNITED STATES (Reported below: 110 Fed. Appx. 471); LIMON-RUIZ *v.* UNITED STATES (110 Fed. Appx. 426); POZOS-SANTILLAN *v.* UNITED STATES (110 Fed. Appx. 455); BIRULA-HERNANDEZ *v.* UNITED STATES (111 Fed. Appx. 334); CARBAJAL-HERNANDEZ *v.* UNITED STATES (110 Fed. Appx. 453); CASTILLO-PENALOZA *v.* UNITED STATES (111 Fed. Appx. 322); SALAZAR-VARELA *v.* UNITED STATES (111 Fed. Appx. 322); CONTRERAS-CEDILLO *v.* UNITED STATES (111 Fed. Appx. 338); FERNANDEZ-PINONES *v.* UNITED STATES (110 Fed. Appx. 470); LUGO-SALDANA *v.* UNITED STATES (110 Fed. Appx. 469); MONDRAGON-JIMENEZ *v.* UNITED STATES (110 Fed. Appx. 463); NUNCIO-RODRIGUEZ *v.* UNITED STATES (111 Fed. Appx. 327); REYES-QUINTANILLA *v.* UNITED STATES (111 Fed. Appx. 748); RODRIGUEZ-ZUNIGA *v.* UNITED STATES (111 Fed. Appx. 747); SARAVIA-MELENDEZ *v.* UNITED STATES (110 Fed. Appx. 434); and VILLASENOR-ARROYO *v.* UNITED STATES (110 Fed. Appx. 440). C. A. 5th Cir.;

No. 04–8147. MCCOMBS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 245;

No. 04–8169. PROCTER *v.* UNITED STATES. C. A. 6th Cir.;

No. 04–8170. GARZA-GARCIA *v.* UNITED STATES; REYES-JASSO *v.* UNITED STATES; and BARRIOS-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 746 (first judgment) and 778 (second judgment); 112 Fed. Appx. 971 (third judgment);

No. 04–8257. MEDINA-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Reported below: 111 Fed. Appx. 961;

No. 04–8259. OLEA-PINO *v.* UNITED STATES. C. A. 9th Cir. Reported below: 111 Fed. Appx. 950; and

No. 04–8285. WILSON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 112 Fed. Appx. 497. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker, ante,* p. 220.

Certiorari Dismissed

No. 04–7653. ARANDA *v.* GALVIN ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–7693. DIXON *v.* CITY OF MINNEAPOLIS WATER DEPARTMENT ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 102 Fed. Appx. 518.

No. 04–7788. ATKINS *v.* FOLTZ. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–8045. COOMBS *v.* GWINN ET AL. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 579 Pa. 530, 856 A. 2d 1201.

No. 04–8205. HARVEY *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506

U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. D–2395. IN RE DISCIPLINE OF HALL. Rupert Arvel Hall, Jr., of Moorestown, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2396. IN RE DISCIPLINE OF RUSSO. Matthew M. Russo, of Long Beach, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2397. IN RE DISCIPLINE OF MCCOLLOUGH. Terry Len McCollough, of Orlando, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2398. IN RE DISCIPLINE OF OLDS. Warner Smith Olds, of Fort Lauderdale, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2399. IN RE DISCIPLINE OF NEUMAN. Reid Scott Neuman, of Northbrook, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2400. IN RE DISCIPLINE OF KARTEN. Alan I. Karten, of Miami, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2401. IN RE DISCIPLINE OF LAUDUMIEY. Fernand Louis Laudumiey III, of New Orleans, La., is suspended from the practice of law in this Court, and a rule will issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2402. IN RE DISCIPLINE OF SCHEURICH. Val K. Scheurich III, of New Orleans, La., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2403. IN RE DISCIPLINE OF NORTON. John V. Norton, of Minneapolis, Minn., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2404. IN RE DISCIPLINE OF ETHEREDGE. James Gaultney Etheredge, of Fort Walton Beach, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2405. IN RE DISCIPLINE OF SENTON. Robert Edmond Senton, of Tallahassee, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2406. IN RE DISCIPLINE OF POOLE. John Michael Poole, of Miami, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2407. IN RE DISCIPLINE OF SILVIA. John Silvia, Jr., of Somerset, Mass., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2408. IN RE DISCIPLINE OF PIPPEN. William Howard Pippen, of Houston, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2409. IN RE DISCIPLINE OF RICKARD. Robert W. Rickard, of Houston, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2410. IN RE DISCIPLINE OF ASHIRU. Rahman Olalekan Ashiru, of Houston, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2411. IN RE DISCIPLINE OF BOYD. William S. Boyd III, of Gulfport, Miss., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2412. IN RE DISCIPLINE OF MOORMAN. Elliott D. Moorman, of East Orange, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2413. IN RE DISCIPLINE OF EPSTEIN. Charles Steven Epstein, of Edison, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2414. IN RE DISCIPLINE OF TANNER. Martin Stanley Tanner, of Salt Lake City, Utah, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2415. IN RE DISCIPLINE OF GROSS. John P. Gross, of Kearny, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2416. IN RE DISCIPLINE OF BUDA. David Newton Buda, of Fort Lee, N. J., is suspended from the practice of law in

this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2417. IN RE DISCIPLINE OF SPENCER. Scott W. Spencer, of Columbus, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2418. IN RE DISCIPLINE OF GEORGE. Donald Elias George, of Akron, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2419. IN RE DISCIPLINE OF WHITAKER. Paul M. Whitaker, of Albany, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 04M44. HALL *v.* TEXAS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. 04M45. STEPHENS *v.* ROCHE, SECRETARY OF THE AIR FORCE; and

No. 04M49. CRUTCHFIELD *v.* GEORGIA DEPARTMENT OF HUMAN RESOURCES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 04M47. SANTOYO *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 04M48. CLARK *v.* MCLEOD. Motion for leave to file petition for writ of certiorari with the supplemental appendix under seal denied without prejudice to filing a renewed motion together with a redacted version of the supplemental appendix within 30 days.

No. 04–621. PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY *v.* DYNEGY POWER MARKETING, INC., ET AL. C. A.

9th Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 04–805. TEXACO INC. *v.* DAGHER ET AL. C. A. 9th Cir.; and

No. 04–814. SHELL OIL CO. *v.* DAGHER ET AL. C. A. 9th Cir. The Acting Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 04–637. BRADSHAW, WARDEN *v.* STUMPF. C. A. 6th Cir. [Certiorari granted *sub nom. Mitchell, Warden* v. *Stumpf, ante,* p. 1042.] Motion of respondent for appointment of counsel granted. Alan M. Freedman, Esq., of Evanston, Ill., is appointed to serve as counsel for respondent in this case.

No. 04–6964. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. [Certiorari granted, *ante,* p. 1042.] Motion of petitioner for appointment of counsel granted. Stephen B. Bedrick, Esq., of Oakland, Cal., is appointed to serve as counsel for petitioner in this case.

No. 04–6715. HALL *v.* MILLER. Sup. Ct. Ky. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1034] denied.

No. 04–6768. FAN *v.* NAG ET AL. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1034] denied.

No. 04–7302. HOOD *v.* BECK ET AL. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1044] denied.

No. 04–7314. OKORO *v.* HEMINGWAY, WARDEN. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1044] denied.

No. 04–7399. MCCONICO *v.* CITY OF BIRMINGHAM, ALABAMA, ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1044] denied.

No. 04–7635. COLLINS *v.* NORRIS ET AL. C. A. 7th Cir.;

No. 04–7856. STONNER *v.* UNITED STATES. C. A. 2d Cir.; and
No. 04–8034. OSTER *v.* SUTTON ET AL. Sup. Ct. N. H. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 15, 2005, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 04–1023. IN RE ADAM;
No. 04–8263. IN RE BRUNO; and
No. 04–8413. IN RE FLOURNOY. Petitions for writs of habeas corpus denied.

No. 04–7981. IN RE AVERY. Petition for writ of habeas corpus denied. JUSTICE SOUTER took no part in the consideration or decision of this petition.

No. 04–7203. IN RE PHELPS;
No. 04–7457. IN RE AARON;
No. 04–7528. IN RE CARDWELL;
No. 04–7889. IN RE MATHISON; and
No. 04–7999. IN RE PHILLIPS. Petitions for writs of mandamus denied.

No. 04–7795. IN RE GREEN. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 03–1238. IBP, INC. *v.* ALVAREZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. C. A. 9th Cir.; and
No. 04–66. TUM ET AL. *v.* BARBER FOODS, INC., DBA BARBER FOODS. C. A. 1st Cir. Motion of National Chicken Council et al. for leave to file a brief as *amici curiae* in No. 03–1238 granted. Certiorari in No. 03–1238 granted limited to Question 1 presented by the petition. Certiorari in No. 04–66 granted limited to Question 1 presented by the petition and the following question: "Do employees have a right to compensation for time they must spend waiting at required safety equipment distribution stations?" Cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 03–1238, 339 F. 3d 894; No. 04–66, 360 F. 3d 274.

No. 04–623. GONZALES, ATTORNEY GENERAL, ET AL. *v.* OREGON ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 368 F. 3d 1118.

No. 04–698. SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, SCHAFFER ET VIR, ET AL. *v.* WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 377 F. 3d 449.

Certiorari Denied

No. 03–660. FREEMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 56 Fed. Appx. 842.

No. 03–1415. RAYMOND ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 355 F. 3d 107.

No. 03–1551. BIEHL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 351 F. 3d 982.

No. 03–10453. REYES VALDEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 32 Cal. 4th 73, 82 P. 3d 296.

No. 04–231. BARBER FOODS, INC., DBA BARBER FOODS *v.* TUM ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 360 F. 3d 274.

No. 04–251. DEMISSIE ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 394.

No. 04–332. LEBRUN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 363 F. 3d 715.

No. 04–339. EVANGELISTA *v.* GONZALES, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 359 F. 3d 145.

No. 04–367. DEWAAL *v.* ALSTON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 711.

No. 04–438. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617, ET AL. *v.* FEDERAL LABOR RELATIONS

AUTHORITY. C. A. 5th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 802.

No. 04–464. CITY OF NEW YORK, NEW YORK, ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 359 F. 3d 83.

No. 04–469. TOWN OF SURFSIDE, FLORIDA *v.* MIDRASH SEPHARDI, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 366 F. 3d 1214.

No. 04–484. NATIONAL TAXPAYERS UNION *v.* SOCIAL SECURITY ADMINISTRATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 376 F. 3d 239.

No. 04–517. CHRISTOPHER VILLAGE, L. P., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 360 F. 3d 1319.

No. 04–574. DARBY *v.* A-BEST PRODUCTS CO. ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 102 Ohio St. 3d 410, 811 N. E. 2d 1117.

No. 04–581. TAXPAYERS OF MICHIGAN AGAINST CASINOS *v.* MICHIGAN ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 471 Mich. 306, 685 N. W. 2d 221.

No. 04–594. MOON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. *v.* NORTH IDAHO FARMERS ASSN. ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 140 Idaho 536, 96 P. 3d 637.

No. 04–599. HENDRICKSON ET AL. *v.* AMERICAN SKANDIA LIFE ASSURANCE CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 96 Fed. Appx. 779.

No. 04–620. JIFRY ET AL. *v.* FEDERAL AVIATION ADMINISTRATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 370 F. 3d 1174.

No. 04–645. BRENNEMAN *v.* MEDCENTRAL HEALTH SYSTEM. C. A. 6th Cir. Certiorari denied. Reported below: 366 F. 3d 412.

No. 04–659. JACOBS *v.* VIENER. Super. Ct. Pa. Certiorari denied. Reported below: 834 A. 2d 546.

No. 04–660. FLOYD, TRUSTEE *v.* LUCAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 411.

No. 04–697. HUDSON *v.* AMERICAN ARBITRATION ASSN., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 947.

No. 04–699. REISER ET AL. *v.* RESIDENTIAL FUNDING CORP., AKA GMAC–RFC. C. A. 7th Cir. Certiorari denied. Reported below: 380 F. 3d 1027.

No. 04–710. SHOELS ET UX. *v.* KLEBOLD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 375 F. 3d 1054.

No. 04–715. MORA *v.* WILLIAMS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 537.

No. 04–720. BATTLE *v.* VIRGINIAN-PILOT, DIVISION OF LANDMARK COMMUNICATIONS, INC., ET AL. Sup. Ct. Va. Certiorari denied.

No. 04–724. RODRIGUEZ-HAZBUN *v.* NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN ET AL.; RODRIGUEZ-HAZBUN *v.* HAZBUN ESCAF; RODRIGUEZ-HAZBUN *v.* NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN; and RODRIGUEZ-HAZBUN *v.* KEITH, JUDGE, CIRCUIT COURT OF VIRGINIA, FAIRFAX COUNTY. Sup. Ct. Va. Certiorari denied.

No. 04–728. DOANE, AKA HARIG *v.* EDUCATIONAL CREDIT MANAGEMENT CORP. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 312.

No. 04–730. DEVER *v.* HENTZEN COATINGS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 380 F. 3d 1070.

No. 04–732. CITY AUTO SALES, LLC *v.* TAYLOR. Sup. Ct. Tenn. Certiorari denied. Reported below: 142 S. W. 3d 277.

No. 04–734. YARACS *v.* SUMMIT ACADEMY ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 845 A. 2d 203.

No. 04–735. TI GROUP AUTOMOTIVE SYSTEMS (NORTH AMERICA), INC., NKA TI GROUP AUTOMOTIVE SYSTEMS, L. L. C. *v.* VDO NORTH AMERICA, L. L. C., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 375 F. 3d 1126.

No. 04–739. MILLS *v.* NOLAN, DIRECTOR, RHODE ISLAND DEPARTMENT OF HEALTH. Super. Ct. Providence County, R. I. Certiorari denied.

No. 04–743. DAVIS *v.* HAMONDS, SUPERINTENDENT, ST. LOUIS PUBLIC SCHOOLS DISTRICT. C. A. 8th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 51.

No. 04–744. MIYARES *v.* FORSYTH COUNTY, NORTH CAROLINA, ET AL. Ct. App. N. C. Certiorari denied. Reported below: 165 N. C. App. 543, 600 S. E. 2d 899.

No. 04–747. HUTTON *v.* HAFIF ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–749. PLONKA *v.* BROWN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 108 Fed. Appx. 31.

No. 04–750. GOULD *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 04–751. H&R BLOCK, INC., ET AL. *v.* CUMMINS ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 04–754. WOOD *v.* FEDERAL AVIATION ADMINISTRATION. C. A. D. C. Cir. Certiorari denied.

No. 04–755. WOOD *v.* FEDERAL AVIATION ADMINISTRATION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 04–758. SOLOW BUILDING CO., LLC *v.* MORGAN GUARANTY TRUST COMPANY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 6 App. Div. 3d 356, 776 N. Y. S. 2d 547.

No. 04–760. OPALEWSKI ET AL. *v.* FITZPATRICK ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 733.

No. 04–765. MAPLES *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 920 So. 2d 1138.

No. 04–771. DIEDRICH *v.* CITY OF NEWPORT NEWS, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 526.

No. 04–772. MCCAMMON *v.* FRAME ET AL. Cir. Ct. Harrison County, W. Va. Certiorari denied.

No. 04–774. VITUG SAGANA *v.* TENORIO, SECRETARY, DEPARTMENT OF LABOR AND IMMIGRATION, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS. C. A. 9th Cir. Certiorari denied. Reported below: 384 F. 3d 731.

No. 04–776. BRYANT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 04–779. SKERLE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 850 A. 2d 14.

No. 04–780. THOMPSON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 267 Ga. App. XXVII.

No. 04–781. XECHEM INTERNATIONAL, INC. *v.* UNIVERSITY OF TEXAS M. D. ANDERSON CANCER CENTER ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 382 F. 3d 1324.

No. 04–785. FOREST ET AL. *v.* PAWTUCKET POLICE DEPARTMENT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 377 F. 3d 52.

No. 04–789. UNITED STATES EX REL. GILLIAM *v.* GENERAL DYNAMICS CORP. C. A. 4th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 143.

No. 04–790. PINGOL MERCADO *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 24.

No. 04–791. DIAZ-SANTOS *v.* DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF PUERTO RICO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 108 Fed. Appx. 638.

No. 04–794. CONNECTICUT *v.* ANTHEM BLUE CROSS AND BLUE SHIELD OF CONNECTICUT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 383 F. 3d 1258.

No. 04–795. BAGNE *v.* JOINT ADMISSIONS COMMITTEE OF THE CLEVELAND AND CUYAHOGA COUNTY BAR ASSNS. Sup. Ct. Ohio. Certiorari denied. Reported below: 102 Ohio St. 3d 182, 808 N. E. 2d 372.

No. 04–796. MORALES *v.* KEYSTONE DEVELOPMENT CO., LLC, ET AL. Ct. App. Colo. Certiorari denied.

No. 04–797. PERRONI *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 358 Ark. 17, 186 S. W. 3d 206.

No. 04–798. ZORA ENTERPRISES, INC. *v.* BURNETT ET UX. App. Ct. Mass. Certiorari denied. Reported below: 61 Mass. App. 341, 810 N. E. 2d 835.

No. 04–799. SMANIA *v.* ABRAMS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 782.

No. 04–801. EICHINGER *v.* EICHINGER. Ct. App. Ind. Certiorari denied. Reported below: 808 N. E. 2d 1241.

No. 04–802. AMANA CO., DBA AMANA APPLIANCES, INC. *v.* EDEN ELECTRICAL, LTD. C. A. 8th Cir. Certiorari denied. Reported below: 370 F. 3d 824.

No. 04–804. CHUNLI WU ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 173.

No. 04–810. BARDIS ET AL. *v.* OATES ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 119 Cal. App. 4th 1, 14 Cal. Rptr. 3d 89.

No. 04–811. BABBITT ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 383 F. 3d 1036.

No. 04–813. JOYAL *v.* HASBRO, INC., DBA HASBRO GAMES. C. A. 1st Cir. Certiorari denied. Reported below: 380 F. 3d 14.

No. 04–815. TREJO *v.* HULICK, ASSISTANT WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 380 F. 3d 1031.

No. 04–818. EVANS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 382 Md. 248, 855 A. 2d 291.

No. 04–821. MORROW *v.* DAIMLERCHRYSLER CORP. ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 895 So. 2d 861.

No. 04–823. O'HANIAN *v.* CALIFORNIA. App. Div., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 04–824. SOUTHEASTERN RUBBER RECYCLING, A DIVISION OF SUNRISE GARDEN MART, INC., ET AL. *v.* ALABAMA DEPART-

MENT OF PUBLIC HEALTH ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 915 So. 2d 1182.

No. 04–825. STAUFFER *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 04–826. NSEK *v.* CIRCLE K STORES ET AL. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 04–827. STEWART ET UX. *v.* SMITH ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 920 So. 2d 1138.

No. 04–829. GOLIN ET AL. *v.* CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 04–832. MARCONE *v.* OFFICE OF DISCIPLINARY COUNSEL. Sup. Ct. Pa. Certiorari denied. Reported below: 579 Pa. 1, 855 A. 2d 654.

No. 04–836. GOLIN ET AL. *v.* ALLENBY, DIRECTOR, CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES. C. A. 9th Cir. Certiorari denied.

No. 04–838. WEINER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 631.

No. 04–839. MONROE *v.* CITY OF RICHMOND, VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 351.

No. 04–840. JENKINS *v.* MTGLQ INVESTORS ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–842. BACON ET AL. *v.* HONDA OF AMERICA MANUFACTURING, INC. C. A. 6th Cir. Certiorari denied. Reported below: 370 F. 3d 565.

No. 04–843. ADDIS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 374 F. 3d 881.

No. 04–846. KNIGHT *v.* RUMSFELD, SECRETARY OF DEFENSE. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 883.

No. 04–849. WILLIAMS ET AL. *v.* KING, ATTORNEY GENERAL OF ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 378 F. 3d 1232.

No. 04–853. BIONDO ET AL. *v.* CITY OF CHICAGO, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 382 F. 3d 680.

No. 04–857. RUKAJ *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–861. UNDERWOOD *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 04–862. BROWN ET VIR *v.* PREMIERE DESIGNS, INC. Ct. App. Ga. Certiorari denied. Reported below: 266 Ga. App. 432, 597 S. E. 2d 466.

No. 04–863. COATNEY *v.* KING. App. Div., Super. Ct. Cal., County of San Francisco. Certiorari denied.

No. 04–864. CHILINGIRIAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–865. CHAPLAINCY OF FULL GOSPEL CHURCHES ET AL. *v.* ENGLAND, SECRETARY OF THE NAVY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 375 F. 3d 1169.

No. 04–866. KAPOOR *v.* GONZALES, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 780.

No. 04–868. MENDOZA *v.* DE LIMA, ADMINISTRATOR, ADULT CLIENT SERVICES BRANCH OF THE SECOND CIRCUIT, HAWAII. C. A. 9th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 583.

No. 04–871. WALKER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–876. PROHAZKA *v.* CLEVELAND CLINIC FOUNDATION ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 04–878. CANALES, JUDGE, 79TH DISTRICT COURT OF TEXAS *v.* TEXAS STATE COMMISSION ON JUDICIAL CONDUCT. Sup. Ct. Tex. Certiorari denied.

No. 04–879. STEFANI *v.* GONZALES, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied.

No. 04–880. VILLASANA *v.* WILHOIT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 368 F. 3d 976.

No. 04–886. UNITED STATES EX REL. TINGLEY ET AL. *v.* 900 MONROE L. L. C. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 466.

No. 04–891. COTTER *v.* CITY OF PORTLAND, OREGON. Ct. App. Ore. Certiorari denied. Reported below: 194 Ore. App. 48, 95 P. 3d 268.

No. 04–893. DARDAR *v.* POTTER, POSTMASTER GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 931.

No. 04–895. EDENS *v.* KENNEDY. C. A. 4th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 870.

No. 04–904. TITTERINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 374 F. 3d 453.

No. 04–909. SCHWARTZ *v.* ISAAC. Ct. Sp. App. Md. Certiorari denied. Reported below: 157 Md. App. 712, 717.

No. 04–915. IVORY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 901.

No. 04–925. STURDY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–956. BRANCH ET AL. *v.* NIX ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 242.

No. 04–958. LANGE *v.* DEPARTMENT OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 108 Fed. Appx. 631.

No. 04–959. HARBUCK *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 378 F. 3d 1324.

No. 04–961. MCMILLAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–967. McCORVEY, FKA ROE *v.* HILL, DALLAS COUNTY DISTRICT ATTORNEY. C. A. 5th Cir. Certiorari denied. Reported below: 385 F. 3d 846.

No. 04–5833. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 343 Ill. App. 3d 1313, 856 N. E. 2d 701.

No. 04–6023. HAMILTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 182.

No. 04–6188. MILLER *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 354 F. 3d 1288.

No. 04–6295. MAXWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 363 F. 3d 815.

No. 04–6348. MOSLEY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 370 F. 3d 467.

No. 04–6390. MARTINEZ-JARAMILLO *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–6577. GORRASI *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 60 Mass. App. 1122, 805 N. E. 2d 531.

No. 04–6669. BARFIELD *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 118 Wash. App. 1036.

No. 04–6679. NWANKWO *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–6698. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 905.

No. 04–6758. RICHARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 242.

No. 04–6828. CERVANTES-MORALES *v.* UNITED STATES; and KANE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 870 (first judgment); 104 Fed. Appx. 405 (second judgment).

No. 04–6830. FRYE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 372 F. 3d 729.

No. 04–6878. LEWIS *v.* GREEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 446.

No. 04–6920. WOODALL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 842 A. 2d 690.

No. 04–6989. WINGEART *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–6999. POWERS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 883 So. 2d 20.

No. 04–7054. BROWN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 33 Cal. 4th 382, 93 P. 3d 244.

No. 04–7056. MURESAN *v.* WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES. Ct. App. Wash. Certiorari denied.

No. 04–7060. PRIDGEN *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 380 F. 3d 721.

No. 04–7093. CARTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 378 F. 3d 584.

No. 04–7120. MURDAUGH *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 209 Ariz. 19, 97 P. 3d 844.

No. 04–7129. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 462.

No. 04–7137. TSOSIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 376 F. 3d 1210.

No. 04–7154. LYNCH *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 877 So. 2d 1254.

No. 04–7294. GRAYSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 879 So. 2d 1008.

No. 04–7298. BELL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 879 So. 2d 423.

No. 04–7382. GARCIA *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 358 N. C. 382, 597 S. E. 2d 724.

No. 04–7413. ALLEN *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 368 F. 3d 1220.

No. 04–7419. HOLLOWAY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 33 Cal. 4th 96, 91 P. 3d 164.

No. 04–7427. PEREZ, AKA LOPEZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 881 So. 2d 1121.

No. 04–7429. DAVIS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 141 S. W. 3d 600.

No. 04–7437. ANDERSON *v.* WEST VIRGINIA. Cir. Ct. Wood County, W. Va. Certiorari denied.

No. 04–7444. LONGWORTH *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 377 F. 3d 437.

No. 04–7450. WOODS *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7451. MCKEITHAN *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 108 Fed. Appx. 55.

No. 04–7453. TUCKER, AKA MACK *v.* NEW YORK. Sup. Ct. N. Y., Kings County. Certiorari denied.

No. 04–7460. ASH *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–7464. KRONCKE *v.* HOOD ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–7466. JOHNSON *v.* HARKLEROAD, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 858.

No. 04–7470. RODRIGUEZ *v.* CHANDLER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 382 F. 3d 670.

No. 04–7471. REED *v.* MICHELSON REALTY CO., DBA VERANDA APARTMENTS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 243.

No. 04–7476. TIBBS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–7477. WARD *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7480. POTTS *v.* BAGLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–7482. SAEZ-MACHADO *v.* GODDARD, ATTORNEY GENERAL OF ARIZONA. C. A. 9th Cir. Certiorari denied.

No. 04–7485. DELEGAL *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 04–7494. SHOYINKA *v.* CITY OF SANTA MONICA, CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–7495. SMITH *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–7498. MCKINNEDY *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 513.

No. 04–7503. YOUNG *v.* VASBINDER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 444.

No. 04–7515. DEAN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied.

No. 04–7517. CLARK *v.* MCLEMORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–7519. JURCONI *v.* GLENHAVEN LAKES CLUB ET AL. Ct. App. Wash. Certiorari denied. Reported below: 117 Wash. App. 1080.

No. 04–7522. DIANA S. *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–7523. RICHARDSON *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 977.

No. 04–7525. BOATMAN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–7530. NWACHUKWU *v.* JOHN HANCOCK MANAGEMENT CO. Ct. App. D. C. Certiorari denied. Reported below: 859 A. 2d 652.

No. 04–7531. MURDOCK *v.* AMERICAN AXLE & MANUFACTURING, INC. Ct. App. Mich. Certiorari denied.

No. 04–7538. FULLER *v.* THOMAS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 496.

No. 04–7541. GRIFFIN *v.* RUBY TUESDAY, INC. C. A. 11th Cir. Certiorari denied.

No. 04–7542. ESPARZA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7546. SANCHEZ *v.* DANKERT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 21.

No. 04–7548. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 119 Cal. App. 4th 132, 13 Cal. Rptr. 3d 921.

No. 04–7552. VINCENT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–7554. DAVENPORT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 924.

No. 04–7555. COVEY *v.* NATURAL FOODS, INC. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 04–7557. MAYRIDES *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 04–7558. MAYES *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–7560. CAMERON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 167.

No. 04–7561. CRAIG *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 859 So. 2d 319.

No. 04–7563. MILLER *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 04–7566. BIBBS *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 04–7571. BYRD *v.* EAGLES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 602.

No. 04–7572. CARDWELL *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 04–7573. BURRELL *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 871 A. 2d 1127.

No. 04–7574. STEINBERGIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 4 App. Div. 3d 192, 771 N. Y. S. 2d 647.

No. 04–7576. SMITH *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 876 So. 2d 1209.

No. 04–7577. ABDUL-MALIK *v.* DEPARTMENT OF HOMELAND SECURITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 864.

No. 04–7579. STILLS *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7580. GERBER *v.* CAMP HOPE CHILDREN'S BIBLE FELLOWSHIP OF NEW YORK, INC. C. A. 2d Cir. Certiorari denied.

No. 04–7582. EDWARDS *v.* JAMROG, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–7584. POTTS *v.* ROSE, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 103 Ohio St. 3d 1524, 817 N. E. 2d 407.

No. 04–7585. WILSON *v.* HURLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 375.

No. 04–7586. CHILES *v.* JORDAN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 180.

No. 04–7587. CIAPRAZI *v.* NASSAU COUNTY, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–7588. CHAPA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 04–7591. BEY *v.* YOUNG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 400.

No. 04–7592. ALEXANDER *v.* CRAWFORD, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–7594. CAMACHO *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 04–7598. MARTINEZ *v.* RYAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7599. COX *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–7600. DUVAL *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 475.

No. 04–7601. TURRENTINE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 04–7602. VIOLET *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 04–7603. WYCHE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7604. THOMAS *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–7606. PUCKETT *v.* COSTELLO. C. A. 6th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 379.

No. 04–7608. BELLS *v.* MAYNARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 535.

No. 04–7611. ROBINSON *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7615. HESSLER *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied.

No. 04–7616. HAGGERTY *v.* AMERICAN AIRLINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 623.

No. 04–7617. FOWLER *v.* COLLIER. C. A. 7th Cir. Certiorari denied.

No. 04–7624. CRANE *v.* HAMILTON ET AL. Ct. App. Ga. Certiorari denied.

No. 04–7626. PEOPLES *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–7627. SLOAN *v.* RUDIANO ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–7629. MORRIS *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 04–7630. SHULER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 888 So. 2d 35.

No. 04–7631. ROBERTS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7636. WARREN *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 04–7638. MULLINS *v.* LAVIGNE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–7640. WOOTEN *v.* ST. FRANCIS MEDICAL CENTER. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 888.

No. 04–7643. WUBKER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–7645. KEELING *v.* KINTZEL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 866.

No. 04–7650. RAMIREZ *v.* FAIRMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 203.

No. 04–7652. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 04–7654. 'ABDULLAH *v.* KENNET ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 104 Fed. Appx. 750.

No. 04–7657. BAYOUD *v.* BAYOUD ET AL. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 04–7659. MYERS *v.* STATEN. C. A. 11th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 785.

No. 04–7660. OTT *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7661. PHILLIPS *v.* MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 04–7663. MCGEE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 989.

No. 04–7664. BOWERS *v.* WEST VIRGINIA. Cir. Ct. Marshall County, W. Va. Certiorari denied.

No. 04–7669. NICHOLSON *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 83 Conn. App. 439, 850 A. 2d 1089.

No. 04–7670. SANNI *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–7672. BARRERA *v.* SUPERIOR COURT OF CALIFORNIA, SAN JOAQUIN COUNTY. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 04–7674. RENEAU *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7678. ROBLES *v.* WILSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7679. SANCHEZ *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 04–7680. PHI QUANG NGUYEN *v.* BOYETTE, SUPERINTENDENT, NASH CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 63.

No. 04–7682. MAHARAJ *v.* OTTENBERG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 95 Fed. Appx. 463.

No. 04–7685. ROY *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7686. WASH *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–7687. TOMOSON *v.* MORGAN, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 305.

No. 04–7689. ANH VU NGUYEN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 119 Wash. App. 1004.

No. 04–7691. COLLINS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 852 A. 2d 907.

No. 04–7694. CARUSO *v.* TRUSTEE OF ST. JUDE CHILDREN'S RESEARCH HOSPITAL ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–7695. OWEN *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7705. GEORGE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 358 Ark. 269, 189 S. W. 3d 28.

No. 04–7706. MESAYS *v.* HUGEL, ADMINISTRATOR, MARYLAND MOTOR VEHICLE ADMINISTRATION. C. A. 4th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 369.

No. 04–7708. REVELS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7709. PERKINS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–7711. REEVES *v.* MORTON, WARDEN. Super. Ct. Charlton County, Ga. Certiorari denied.

No. 04–7713. KEFAUVER *v.* HOGAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 102 Fed. Appx. 768.

No. 04–7714. MCGRAW *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–7715. ANDERSON *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 446.

No. 04–7716. BURNETT *v.* WALKER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–7717. ASLAN *v.* SHEANAN ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–7719. WALTON *v.* HUMPHREY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–7720. SANCHEZ VASQUEZ *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7722. TERRY *v.* FREDERICK, WARDEN. Cir. Ct. Boone County, W. Va. Certiorari denied.

No. 04–7723. VAUGHN *v.* FIFTH THIRD BANK. Sup. Ct. Tenn. Certiorari denied.

No. 04–7726. PIZIO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–7727. FADAEL *v.* S & S STRAND. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–7732. JEFFRIES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 04–7733. JABAAY *v.* JABAAY ET AL. Ct. App. Ind. Certiorari denied. Reported below: 804 N. E. 2d 789.

No. 04–7734. KING *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7735. JOHNSON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7736. MCRAE *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 963.

No. 04–7738. HOKE *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 04–7743. HOWZE *v.* YARBOROUGH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 515.

No. 04–7746. HARRIS *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7747. HAYES *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 942.

No. 04–7748. ROBERSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7749. SINGLETON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–7750. SNIPES *v.* BECK, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 802.

No. 04–7752. RATCLIFF *v.* INDYMAC BANK, F. S. B. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 04–7753. SIMMONS *v.* MALONE ET AL. Sup. Ct. La. Certiorari denied. Reported below: 882 So. 2d 1147.

No. 04–7754. VALENTINE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 876 So. 2d 572.

No. 04–7755. YARBOUGH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–7756. WALTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 5 App. Div. 3d 1107, 773 N. Y. S. 2d 677.

No. 04–7763. FERRARA *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 04–7764. FEIST *v.* BERG ET AL. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 04–7765. HERBERT *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–7766. FULTON *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–7767. GILES *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 119 Wash. App. 1018.

No. 04–7769. HOSFORD *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–7770. HERNANDEZ *v.* BERGER ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 686 N. W. 2d 107.

No. 04–7771. HOLBROOK *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 877 So. 2d 525.

No. 04–7772. HUTCH *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 105 Haw. 130, 94 P. 3d 685.

No. 04–7781. GARZA *v.* PENNELL. C. A. 6th Cir. Certiorari denied.

No. 04–7782. FANIEL *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7783. HOLLOWAY *v.* HAMLET, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7785. HOPKINS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 882 So. 2d 388.

No. 04–7787. BLACK *v.* GORDON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7789. ANGARITA *v.* GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 04–7790. RIVAS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–7792. STRANGE *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 468.

No. 04–7794. RUTHERFORD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 880 So. 2d 1212.

No. 04–7796. GARRETT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7797. FABIAN *v.* CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–7801. HALL ET AL. *v.* HANSCOM AIR FORCE BASE ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–7803. TONEY *v.* ILLINOIS DEPARTMENT OF CORRECTIONS. Sup. Ct. Ill. Certiorari denied.

No. 04–7826. SPERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 375 F. 3d 1285.

No. 04–7828. REED *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 111.

No. 04–7837. MORGAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 212 Ill. 2d 148, 817 N. E. 2d 524.

No. 04–7840. LANGHORNE *v.* GONZALES, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 377 F. 3d 175.

No. 04–7846. MONTGOMERY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 377 F. 3d 582.

No. 04–7849. PATTERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 965.

No. 04–7850. WICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 648.

No. 04–7861. ALVARADO-RIVERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–7863. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–7868. GILDON *v.* BOWEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 384 F. 3d 883.

No. 04–7870. BLANKENSHIP *v.* BASKERVILLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 733.

No. 04–7872. LAMAR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 102 Ohio St. 3d 467, 812 N. E. 2d 970.

No. 04–7874. VERNON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 303.

No. 04–7879. RAZO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–7881. PERKINS *v.* WADDINGTON, SUPERINTENDENT, STAFFORD CREEK CORRECTIONS CENTER. Ct. App. Wash. Certiorari denied. Reported below: 119 Wash. App. 1071.

No. 04–7882. POFF ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 881 So. 2d 564.

No. 04–7886. DORET *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 848 A. 2d 616.

No. 04–7890. KILLINS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7892. SCIBLE *v.* HAINES, WARDEN. Cir. Ct. Pendleton County, W. Va. Certiorari denied.

No. 04–7894. RASMUSSEN *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 100 Fed. Appx. 836.

No. 04–7895. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 890.

No. 04–7898. PETIT *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–7902. COLLINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 701.

No. 04–7905. SWAFFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 385 F. 3d 1026.

No. 04–7906. NEGRETE-MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 390.

No. 04–7908. MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–7909. MCKEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 389 F. 3d 697.

No. 04–7911. RIVAS-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 365 F. 3d 806.

No. 04–7919. BEGOVIC *v.* CITY OF DOVER, NEW HAMPSHIRE, ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–7920. PARDUE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 385 F. 3d 101.

No. 04–7923. MATUTE-GALDAMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 264.

No. 04–7926. EWELL *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 04–7927. DEMEREE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 602.

No. 04–7929. DOMINGUEZ *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 04–7931. LINDELL *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 377 F. 3d 655.

No. 04–7933. MORGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 386 F. 3d 376.

No. 04–7934. POPOCA-ANSELMO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 331.

No. 04–7937. STAVES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 383 F. 3d 977.

No. 04–7938. REESE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 986.

No. 04–7947. MARKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 379 F. 3d 1114.

No. 04–7949. MATLOCK, AKA STRATFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 292.

No. 04–7950. LEWIS, AKA SHEEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 386 F. 3d 475.

No. 04–7953. LOGGINS *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 32 Kan. App. 2d xxxviii, 89 P. 3d 662.

No. 04–7959. DEL TORO GUDINO, AKA DEL TORO-GUDINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 376 F. 3d 997.

No. 04–7964. WHITE *v.* LAMOUTTE, BANKRUPTCY JUDGE, UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT, ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–7966. RIDDLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–7969. SOBRILSKI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–7971. AGUIRRE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–7973. MCKENITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–7974. MURPHY *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 04–7975. CUEVAS MORALES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–7978. SANCHEZ-GONZALEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 287.

No. 04–7983. OKPALA *v.* GAL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 107.

No. 04–7984. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 385.

No. 04–7989. GALLARDO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 377 F. 3d 573.

No. 04–7994. MARTIN *v.* COPLAN, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 04–7995. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–7996. GARNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 245.

No. 04–7998. MCHENRY *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 268 Neb. 219, 682 N. W. 2d 212.

No. 04–8007. LINDELL *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 872.

No. 04–8008. CONYERS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 388 F. 3d 1380.

No. 04–8010. FRIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 643.

No. 04–8011. GARCIA-DOMINGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 983.

No. 04–8012. GELMAN *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 88 Fed. Appx. 463.

No. 04–8025. JOHNSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 858 A. 2d 1276.

No. 04–8029. RIOS-LUNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 267.

No. 04–8031. TAMAYO-TAPIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 674.

No. 04–8033. BROCK *v.* DONNELLY. C. A. 2d Cir. Certiorari denied.

No. 04–8037. COE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8042. DELACRUZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 694.

No. 04–8044. CRUZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 346.

No. 04–8049. CHONG, AKA LAMBERT, AKA CHUNG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 362.

No. 04–8054. MENDEZ-MORALES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 384 F. 3d 927.

No. 04–8056. WYATT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 780.

No. 04–8058. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 233.

No. 04–8059. LOPEZ BOBADILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 823.

No. 04–8060. LEFKOWITZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–8061. COLEMAN-BEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 859 A. 2d 652.

No. 04–8062. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 845.

No. 04–8069. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 376 F. 3d 570.

No. 04–8070. MOORE *v.* EXXON MOBIL CORP., FKA MOBIL OIL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 177.

No. 04–8077. BROWN *v.* ILLINOIS LABOR RELATIONS BOARD PANEL ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 04–8082. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 641.

No. 04–8083. BOLDT *v.* NEWTON. Ct. App. Ore. Certiorari denied. Reported below: 192 Ore. App. 386, 86 P. 3d 49.

No. 04–8090. DIXON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 450.

No. 04–8092. CLAY *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 04–8097. RUSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–8099. SANDLES *v.* SCIBANA, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–8101. PEREA *v.* BUSH, PRESIDENT OF THE UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 947.

No. 04–8104. VIVAR-ACOSTA, AKA VIVAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 328.

No. 04–8106. JACOBS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–8110. HASSON, AKA GALERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 333 F. 3d 1264.

No. 04–8111. KEYS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 882.

No. 04–8113. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 245.

No. 04–8115. VILLA TELLEZ, AKA VILLANUEVA-GARCIA, AKA VILLA-TELLES, AKA VILLA-TELLAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 273.

No. 04–8118. LASHLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–8119. GUTIERREZ-GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 732.

No. 04–8120. GRIFFIN *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–8122. HARDING *v.* STERNES, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 380 F. 3d 1034.

No. 04–8123. HASTINGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 386.

No. 04–8139. COPLIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 106 Fed. Appx. 143.

No. 04–8141. FORTE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 856 A. 2d 567.

No. 04–8144. FISHER *v.* COPELAND, JUDGE, CIRCUIT COURT OF MISSOURI, 34TH CIRCUIT. Sup. Ct. Mo. Certiorari denied.

No. 04–8148. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 343.

No. 04–8149. BROWN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 374 F. 3d 1326.

No. 04–8150. WATTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 641.

No. 04–8155. PERILLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 386.

No. 04–8166. GONZALEZ LORA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 731.

No. 04–8167. BABIAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 390 F. 3d 598.

No. 04–8174. BAILEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 1.

No. 04–8177. TYSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 351.

No. 04–8179. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 938.

No. 04–8184. PORT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 798.

No. 04–8185. MONSALVE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 388 F. 3d 71.

No. 04–8202. GRICCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–8203. HUGHES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 148.

No. 04–8204. GIBBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 954.

No. 04–8206. GREEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–8208. HOLUB *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 04–8209. HOLMES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 385 F. 3d 786.

No. 04–8210. MINERD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 841.

No. 04–8211. MONTES-ANDINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 436.

No. 04–8214. KENYON *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 96 P. 3d 1016.

No. 04–8215. MESCUAL-CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 387 F. 3d 1.

No. 04–8223. NORWOOD *v.* SMITH, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 115 Fed. Appx. 601.

No. 04–8224. PACHECO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 163.

No. 04–8226. KEEPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–8227. KATOA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 379 F. 3d 1203.

No. 04–8228. JONES *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 785.

No. 04–8231. WOODARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 387 F. 3d 1329.

No. 04–8233. TRIBBLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–8237. PASTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–8244. CRUZ-CABRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 443.

No. 04–8245. CARDOZA-LIRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 458.

No. 04–8246. DE LA ROSA-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–8247. DIAZ-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 320.

No. 04–8250. PICKRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 459.

No. 04–8252. MORALES-CERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 325.

No. 04–8271. RAMIREZ-GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 348.

No. 04–8272. DOSHIER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 716.

No. 04–8273. MESCUAL-CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 387 F. 3d 1.

No. 04–8289. ANTHONY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 428.

No. 04–8294. MCMILLIAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 642.

No. 04–8316. DUENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 439.

No. 04–8334. VILLANUEVA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8348. WORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 773.

No. 04–8362. LOPEZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 984.

No. 04–8365. RUIZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 381 F. 3d 1237.

No. 04–753. INVERSIONES ERRAZURIZ LIMITADA, FKA INVERSIONES ERRAZURIZ S. A., ET AL. *v.* STATE STREET BANK & TRUST CO. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 374 F. 3d 158.

No. 04–770. LOUISIANA *v.* BROWN. Sup. Ct. La. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 879 So. 2d 1276.

No. 04–778. PAN AMERICAN ENERGY, LLC *v.* CANDLEWOOD TIMBER GROUP, LLC, ET AL. Sup. Ct. Del. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 859 A. 2d 989.

No. 04–792. CARTER, WARDEN *v.* CLINKSCALE. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 375 F. 3d 430.

No. 04–844. NEW MEXICO *v.* JOHNSON. Sup. Ct. N. M. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 136 N. M. 348, 98 P. 3d 998.

No. 04–845. NEW MEXICO *v.* ALVAREZ-LOPEZ. Sup. Ct. N. M. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 136 N. M. 309, 98 P. 3d 699.

No. 04–851. AQUAMAR S. A. *v.* E. I. DU PONT DE NEMOURS & CO. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 881 So. 2d 1.

No. 04–954. PIMENTAL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the con-

sideration or decision of this petition. Reported below: 380 F. 3d 575.

No. 04–7454. DUNBAR *v.* STATE STREET BANK & TRUST CO. (three judgments). App. Ct. Conn. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 04–7507. LEWIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. JUSTICE BREYER would grant the petition for writ of certiorari. Reported below: 33 Cal. 4th 214, 91 P. 3d 928.

Rehearing Denied

No. 03–10445. CHAPMAN *v.* PENNSYLVANIA ET AL., *ante*, p. 834;

No. 03–10447. SONNIER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 834;

No. 03–10509. IN RE RIVAS, *ante*, p. 808;

No. 03–10995. HOWELL *v.* UNITED STATES, *ante*, p. 862;

No. 04–447. CLISSURAS *v.* CONCORD VILLAGE OWNERS, INC., ET AL., *ante*, p. 1021;

No. 04–638. ZAVALIDROGA *v.* UNITED STATES, *ante*, p. 1035;

No. 04–5244. WAGSTAFF *v.* PALAKOVICH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL., *ante*, p. 889;

No. 04–5755. COLEMAN *v.* NASSAU COUNTY, NEW YORK, *ante*, p. 933;

No. 04–5794. GOLDSTEIN *v.* HARVARD UNIVERSITY, *ante*, p. 1035;

No. 04–5866. SPUCK *v.* DESUTA, SUPERINTENDENT, STATE REGIONAL CORRECTIONAL FACILITY AT MERCER, ET AL., *ante*, p. 945;

No. 04–5951. NEWMAN *v.* ROWLEY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, *ante*, p. 947;

No. 04–6008. STRONG *v.* ILLINOIS VOCATIONAL REHABILITATION PROGRAM, *ante*, p. 962;

No. 04–6070. FISHER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 963;

No. 04–6168. RODRIGUEZ *v.* GAILOR ET AL., *ante*, p. 980;

No. 04–6208. SPOTTSVILLE *v.* TERRY, WARDEN, *ante*, p. 989;

No. 04–6241. MURRAY *v.* PERLOW, *ante*, p. 990;

No. 04–6246. STRONG *v.* MCCUSKEY, JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, *ante*, p. 966;

No. 04–6253. PHILLIPS *v.* LANSING SCHOOL DISTRICT ET AL., *ante*, p. 990;

No. 04–6349. ADAMES *v.* MARTINEZ ET AL., *ante*, p. 1015;

No. 04–6376. MONK *v.* LAFLER, WARDEN, *ante*, p. 1006;

No. 04–6388. LYLES *v.* SEACOR MARINE, INC., *ante*, p. 1006;

No. 04–6403. RECIO-VALLEJO *v.* UNITED STATES, *ante*, p. 1058;

No. 04–6405. STRONG *v.* BAKER, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, *ante*, p. 969;

No. 04–6416. BROOKS *v.* UNITED STATES, *ante*, p. 1058;

No. 04–6579. IN RE BARKCLAY, *ante*, p. 1020;

No. 04–6697. BLAIR *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1027;

No. 04–6721. IN RE GREEN, *ante*, p. 954;

No. 04–6727. CAPPA *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 1027;

No. 04–6731. SCOTT *v.* WACKENHUT CORP. ET AL., *ante*, p. 1035;

No. 04–6775. BENSON *v.* HOME DEPOT U. S. A., INC., *ante*, p. 1036;

No. 04–6776. MATHIS *v.* UNITED STATES, *ante*, p. 993;

No. 04–6777. LUCAS *v.* ADAMS, WARDEN, *ante*, p. 1027;

No. 04–6821. COCKRELL *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, *ante*, p. 1036;

No. 04–6869. IN RE SMITH, *ante*, p. 986;

No. 04–6916. GRAVES *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, *ante*, p. 1028;

No. 04–6973. MCQUIDDY *v.* UNITED STATES, *ante*, p. 1013;

No. 04–7019. VEILLEUX *v.* UNITED STATES, *ante*, p. 1014;

No. 04–7052. GLASKER *v.* TRANSAMERICA FINANCIAL SERVICES, INC., ET AL., *ante*, p. 1028;

No. 04–7086. DANIELS *v.* UNITED STATES, *ante*, p. 1029;

No. 04–7251. PARKER *v.* RENICO, WARDEN, *ante*, p. 1072;

No. 04–7272. HAMMER *v.* AMAZON.COM, *ante*, p. 1072;

No. 04–7325. LOPEZ *v.* UNITED STATES, *ante*, p. 1074;

No. 04–7375. PADGETT *v.* UNITED STATES, *ante*, p. 1075;

No. 04–7425. THOMPSON *v.* BROWNLEE, ACTING SECRETARY OF THE ARMY, *ante*, p. 1076;

No. 04–7730. BAEZ-LEON *v.* UNITED STATES; GARCIA-RAMIREZ *v.* UNITED STATES; LARIOS-ANDRADE *v.* UNITED STATES; YANEZ-GOVEA *v.* UNITED STATES; RAMIREZ-YANEZ *v.* UNITED STATES; and MARTINEZ-MARTINEZ *v.* UNITED STATES, *ante*, p. 1128; and

No. 04–7786. ELIZALDE-CASARES *v.* UNITED STATES; PEQUE-PEREZ *v.* UNITED STATES; REYES-MANCIAS *v.* UNITED STATES; REYES-PASCUAL *v.* UNITED STATES; SIERRA-MADRIGAL *v.* UNITED STATES; DIAZ-SANCHEZ *v.* UNITED STATES; GARCIA-LOPEZ *v.* UNITED STATES; COBOS-PEREZ *v.* UNITED STATES; GOMEZ-DELGADO *v.* UNITED STATES; HERRERA-BARAJAS *v.* UNITED STATES; JIMENEZ LOPEZ *v.* UNITED STATES; QUIRINO *v.* UNITED STATES; RODRIGUEZ-MEDINA *v.* UNITED STATES; OLALDE-SERNA *v.* UNITED STATES; SANTOS-HERNANDEZ *v.* UNITED STATES; HERNANDEZ RIVERA *v.* UNITED STATES; GOMEZ-VARGAS *v.* UNITED STATES; and ESTRADA-RODRIGUEZ *v.* UNITED STATES, *ante*, p. 1129. Petitions for rehearing denied.

No. 03–658. DEEP *v.* RECORDING INDUSTRY ASSN. OF AMERICA, INC., ET AL., 540 U. S. 1107; and

No. 03–10651. WARD *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante*, p. 842. Motions of petitioners for leave to file petitions for rehearing denied.

FEBRUARY 28, 2005

Certiorari Granted—Vacated and Remanded

No. 04–414. ROACH *v.* UNITED STATES. C. A. 7th Cir. Reported below: 372 F. 3d 907; and

No. 04–1004. COLL *v.* UNITED STATES. C. A. 11th Cir. Reported below: 120 Fed. Appx. 785. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, *ante*, p. 220.

No. 04–6302. SMITH *v.* UNITED STATES. C. A. 6th Cir. Reported below: 100 Fed. Appx. 524;

No. 04–7175. SENN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 247;

No. 04–7290. JIMENEZ-CID *v.* UNITED STATES. C. A. 5th Cir. Reported below: 104 Fed. Appx. 436;

No. 04–7798. FRANCIS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 367 F. 3d 805;

No. 04–7844. SMITH *v.* UNITED STATES. C. A. 11th Cir. Reported below: 385 F. 3d 1342;

No. 04–7888. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Reported below: 111 Fed. Appx. 876;

No. 04–7903. DEASON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 124 Fed. Appx. 222;

No. 04–7907. MOHR *v.* UNITED STATES. C. A. 8th Cir. Reported below: 382 F. 3d 857;

No. 04–7917. ARMSTEAD, AKA WOODSON *v.* UNITED STATES. C. A. 3d Cir. Reported below: 117 Fed. Appx. 182;

No. 04–7921. MANDILE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 122 Fed. Appx. 986;

No. 04–7942. BURNETTE *v.* UNITED STATES. C. A. 1st Cir. Reported below: 375 F. 3d 10;

No. 04–7957. WALKER *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 977;

No. 04–7985. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 110 Fed. Appx. 407;

No. 04–7986. GORE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 102 Fed. Appx. 292;

No. 04–7991. GUZMAN-REYES *v.* UNITED STATES. C. A. 5th Cir. Reported below: 113 Fed. Appx. 607;

No. 04–8030. VILLANUEVA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 312;

No. 04–8041. EVANS *v.* UNITED STATES. C. A. 1st Cir.;

No. 04–8065. EDWARDS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 107 Fed. Appx. 420;

No. 04–8071. MENDOZA-MESA *v.* UNITED STATES. C. A. 8th Cir. Reported below: 384 F. 3d 951;

No. 04–8073. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Reported below: 112 Fed. Appx. 266;

No. 04–8074. MARSHEK *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 248;

No. 04–8075. LOWE *v.* UNITED STATES. C. A. 6th Cir. Reported below: 110 Fed. Appx. 574;

No. 04–8114. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 112 Fed. Appx. 335;

No. 04–8128. BOWENS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 108 Fed. Appx. 945;

No. 04–8130. AARON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 110 Fed. Appx. 421;

No. 04–8162. ROSS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 123 Fed. Appx. 386;

No. 04–8173. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 110 Fed. Appx. 356;

No. 04–8187. SOLLEDER *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 738;

No. 04–8189. HUDSON *v.* UNITED STATES. C. A. 4th Cir. Reported below: 97 Fed. Appx. 427;

No. 04–8207. HOLT *v.* UNITED STATES. C. A. 6th Cir. Reported below: 106 Fed. Appx. 976;

No. 04–8216. SIMPSON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 116 Fed. Appx. 736;

No. 04–8217. SANCHEZ-CARRASCO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 756;

No. 04–8238. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Reported below: 109 Fed. Appx. 550;

No. 04–8255. JUAREGUI-VILLAREAL *v.* UNITED STATES. C. A. 9th Cir. Reported below: 111 Fed. Appx. 520;

No. 04–8262. BOWKER *v.* UNITED STATES. C. A. 6th Cir. Reported below: 372 F. 3d 365;

No. 04–8274. SMITH *v.* UNITED STATES. C. A. 6th Cir. Reported below: 110 Fed. Appx. 559;

No. 04–8275. DELAROSA CIVIL, AKA DELAROSA MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 112 Fed. Appx. 968;

No. 04–8296. HOANG VAN NGUYEN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 239;

No. 04–8298. LOREDO-TORRES, AKA VEGA PEREZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 110 Fed. Appx. 445;

No. 04–8299. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 285;

No. 04–8301. BATTEN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 112 Fed. Appx. 345;

No. 04–8303. ARIAS-HERNANDEZ ET AL. *v.* UNITED STATES; AVILES-JAIMES *v.* UNITED STATES; CORTEZ-ESPINOZA *v.* UNITED STATES; GONZALEZ-TREJO *v.* UNITED STATES; MENDEZ-MARROQUIN *v.* UNITED STATES; MACIAS ORTIZ *v.* UNITED STATES; and PEREZ-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 110 Fed. Appx. 427 (sixth judgment) and 460 (fourth judgment); 111 Fed. Appx. 336 (seventh judgment), 337 (third

judgment), 744 (first judgment), and 745 (fifth judgment); 112 Fed. Appx. 341 (second judgment);

No. 04–8304. MARTINEZ ALFARO ET AL. *v.* UNITED STATES (Reported below: 110 Fed. Appx. 430); AVILA-FERNANDEZ *v.* UNITED STATES (111 Fed. Appx. 328); CANO-ROBLEDO *v.* UNITED STATES (110 Fed. Appx. 429); CASTOR-LOZANO *v.* UNITED STATES (111 Fed. Appx. 317); CONTRERAS-TERRAZAS *v.* UNITED STATES (110 Fed. Appx. 450); FRAUSTO-GARCIA *v.* UNITED STATES (111 Fed. Appx. 319); GARCIA *v.* UNITED STATES (111 Fed. Appx. 318); HERNANDEZ-DE LA TORRE *v.* UNITED STATES (111 Fed. Appx. 316); JAQUEZ-TENORIO *v.* UNITED STATES (111 Fed. Appx. 318); MARRUFO-GUTIERREZ *v.* UNITED STATES (110 Fed. Appx. 432); MIRANDA MOYA *v.* UNITED STATES (110 Fed. Appx. 429); SANCHEZ-MORALES *v.* UNITED STATES (111 Fed. Appx. 316); NAVARRO-MOLINA *v.* UNITED STATES (111 Fed. Appx. 321); HERRERA NUNEZ *v.* UNITED STATES (110 Fed. Appx. 428); NUNEZ-RETAMA *v.* UNITED STATES (110 Fed. Appx. 465); RAMIREZ-VIRUETE *v.* UNITED STATES (111 Fed. Appx. 320); ROBLES-VERTIZ *v.* UNITED STATES (110 Fed. Appx. 428); RODRIGUEZ-MEDINA *v.* UNITED STATES (111 Fed. Appx. 329); and VILLALOBOS-LOPEZ *v.* UNITED STATES (110 Fed. Appx. 464). C. A. 5th Cir.;

No. 04–8305. GONZALEZ-AMARO ET AL. *v.* UNITED STATES; and RIOS-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 110 Fed. Appx. 464 (first judgment); 111 Fed. Appx. 749 (second judgment);

No. 04–8315. CANTU-MARICHALAR *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 323;

No. 04–8318. PAGHENSE *v.* UNITED STATES. C. A. 2d Cir. Reported below: 110 Fed. Appx. 168;

No. 04–8328. HACKWORTH *v.* UNITED STATES. C. A. 5th Cir.;

No. 04–8355. GARCIA *v.* UNITED STATES; and BROOKS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 110 Fed. Appx. 434 (first judgment); 111 Fed. Appx. 323 (second judgment);

No. 04–8356. GRAY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 123 Fed. Appx. 387;

No. 04–8359. DE LA OSSA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 124 Fed. Appx. 642;

No. 04–8380. RAMOS-BIRRUETA *v.* UNITED STATES; CENICEROS-FLORES *v.* UNITED STATES; CHAVEZ-CRUZ *v.* UNITED STATES (Reported below: 114 Fed. Appx. 347); ESPINO-MERCADO *v.* UNITED STATES; GRANADOS-MORENO *v.* UNITED STATES;

HERNANDEZ-HERNANDEZ *v.* UNITED STATES (387 F. 3d 799); LABRA-VALLADARES *v.* UNITED STATES (114 Fed. Appx. 348); MENDEZ-MEJIA *v.* UNITED STATES; OROSCO RIOS *v.* UNITED STATES; TABARES-RIVERA *v.* UNITED STATES (113 Fed. Appx. 763); and VEGA-LEON *v.* UNITED STATES. C. A. 9th Cir.;

No. 04–8389. SAUNDERS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 124 Fed. Appx. 642;

No. 04–8401. ALPERT *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 248;

No. 04–8431. PEREZ *v.* UNITED STATES. C. A. 11th Cir.; and

No. 04–8442. PIERCE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 112 Fed. Appx. 4. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, *ante*, p. 220.

No. 04–7804. VANG *v.* MINNESOTA. Ct. App. Minn. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Smith* v. *Massachusetts*, *ante*, p. 462.

Certiorari Dismissed

No. 04–7869. ARANDA *v.* STEWART ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–8332. OWENS-EL *v.* HOOD, WARDEN. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 117 Fed. Appx. 35.

Miscellaneous Orders

No. 04M50. JOHNSON *v.* CAIN, WARDEN. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 04M51. BRENNAN *v.* MERCEDES BENZ USA ET AL.;

No. 04M52. WILSON *v.* BARTOS, WARDEN, ET AL.;

No. 04M53. MEADOWS *v.* OKLAHOMA ET AL.;

No. 04M54. HENDERSON *v.* YARBOROUGH, WARDEN, ET AL.; and

No. 04M55. LEON C. BAKER P. C. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 04M56. HAMRICK *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. Motion for leave to proceed as a seaman denied.

No. 03–9877. CUTTER ET AL. *v.* WILKINSON, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 924.] Motion of the Acting Solicitor General for divided argument granted.

No. 04–277. NATIONAL CABLE & TELECOMMUNICATIONS ASSN. ET AL. *v.* BRAND X INTERNET SERVICES ET AL.; and

No. 04–281. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* BRAND X INTERNET SERVICES ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1018.] Motion of the Acting Solicitor General for divided argument granted.

No. 04–278. TOWN OF CASTLE ROCK, COLORADO *v.* GONZALES, INDIVIDUALLY AND AS NEXT BEST FRIEND OF HER DECEASED MINOR CHILDREN, GONZALES ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 955.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–607. LABORATORY CORPORATION OF AMERICA HOLDINGS, DBA LABCORP *v.* METABOLITE LABORATORIES, INC., ET AL. C. A. Fed. Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States limited to the following question: "Respondent's patent claims a method for detecting a form of vitamin B deficiency, which focuses upon a correlation in the human body between elevated levels of certain amino acids and deficient levels of vitamin B. The method consists of the following: First, measure the level of the relevant amino acids using any device, whether the device is, or is not, patented; second, notice whether the amino acid level is elevated and, if so, conclude that a vitamin B deficiency exists. Is the patent invalid because one cannot patent 'laws of nature, natural phenomena, and abstract ideas'? *Diamond* v. *Diehr*, 450 U. S. 175, 185 (1981)."

No. 04–7036. VENTIMIGLIA *v.* ST. LOUIS COUNTY, MISSOURI, ET AL. C. A. 8th Cir. Motion of petitioner for reconsideration

of order denying leave to proceed *in forma pauperis* [*ante*, p. 1048] denied.

No. 04–7799. JALIL *v.* AVDEL CORP. ET AL. C. A. 3d Cir.;

No. 04–7854. TSABBAR *v.* 17 EAST 89TH STREET TENANTS, INC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept.; and

No. 04–8325. HIGH ET UX. *v.* UNITED STATES. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 21, 2005, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 04–8566. IN RE BOWLING. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 04–473. GARCETTI ET AL. *v.* CEBALLOS. C. A. 9th Cir. Motion of California State Association of Counties for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 361 F. 3d 1168.

No. 04–597. UNITHERM FOOD SYSTEMS, INC. *v.* SWIFT-ECKRICH, INC., DBA CONAGRA REFRIGERATED FOODS. C. A. Fed. Cir. Certiorari granted limited to the following question: "Whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury, but neither renewed that motion under Rule 50(b) after the jury's verdict, nor moved for a new trial under Rule 59?" Reported below: 375 F. 3d 1341.

No. 04–631. WAGNON, SECRETARY, KANSAS DEPARTMENT OF REVENUE *v.* PRAIRIE BAND POTAWATOMI NATION. C. A. 10th Cir. Certiorari granted. Reported below: 379 F. 3d 979.

No. 04–712. LINCOLN PROPERTY CO. ET AL. *v.* ROCHE ET UX. C. A. 4th Cir. Certiorari granted. Reported below: 373 F. 3d 610.

Certiorari Denied

No. 04–450. TSOLAINOS *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 864 So. 2d 905.

No. 04–489. BROWARD YACHTS, INC. *v.* SEAGROVE TRADING, INC. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 183.

No. 04–536. CITY OF NEW ORLEANS, LOUISIANA *v.* MUNICIPAL ADMINISTRATIVE SERVICES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 376 F. 3d 501.

No. 04–570. MARTIN *v.* BOYD GAMING CORP., DBA M/V TREASURE CHEST CASINO, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 374 F. 3d 375.

No. 04–624. HAMMOND ET AL., IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF THE IDAHO STATE TAX COMMISSION *v.* COEUR D'ALENE TRIBE OF IDAHO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 384 F. 3d 674.

No. 04–668. MCBRIDE ET AL. *v.* ORTIZ. C. A. 2d Cir. Certiorari denied. Reported below: 380 F. 3d 649.

No. 04–705. BRYAN *v.* BELLSOUTH TELECOMMUNICATIONS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 377 F. 3d 424.

No. 04–718. WILLIAMS ET AL. *v.* CONSOLIDATED CITY OF JACKSONVILLE, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 341 F. 3d 1261.

No. 04–819. SWIFT-ECKRICH, INC., DBA CONAGRA REFRIGERATED FOODS *v.* UNITHERM FOOD SYSTEMS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 375 F. 3d 1341.

No. 04–867. RODRIGUEZ *v.* VANDER JAGT ET AL.; and RODRIGUEZ *v.* HFP, INC., ET AL. Sup. Ct. Va. Certiorari denied.

No. 04–884. MILLER *v.* FIRSTAR BANK N. A. C. A. 6th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 796.

No. 04–887. SOETH ET VIR *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 704.

No. 04–890. DE LA VEGA-NAVARRO ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 890.

No. 04–907. APPOLO FUELS, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 381 F. 3d 1338.

No. 04–960. SPURGEON *v.* FLEMING, SUPERINTENDENT, MONROE CORRECTIONAL COMPLEX. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 691.

No. 04–987. ZIMMER ET AL. *v.* FISERV SERVICES, INC., AS SUCCESSOR TO FISERV CORRESPONDENT SERVICES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 102 Fed. Appx. 190.

No. 04–1003. DOWTY *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 60 M. J. 163.

No. 04–1007. MERCER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 864 A. 2d 110.

No. 04–1013. WALLACE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 389 F. 3d 483.

No. 04–1019. DHINSA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–6030. ADAMS *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–6444. ANDREWS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–6524. OGROD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 576 Pa. 412, 839 A. 2d 294.

No. 04–6711. OVIEDO *v.* MYERS, FKA OVIEDO. Super. Ct. Gwinnett County, Ga. Certiorari denied.

No. 04–6713. NUNES *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 375 F. 3d 805.

No. 04–7040. BARAJAS-AVALOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 359 F. 3d 1204 and 377 F. 3d 1040.

No. 04–7094. DIXON *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 04–7227. BROWN *v.* LUEBBERS, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 371 F. 3d 458.

No. 04–7369. RAMIREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 376 F. 3d 785.

No. 04–7430. CONNER *v.* MCBRIDE, SUPERINTENDENT, MAXIMUM CONTROL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 375 F. 3d 643.

No. 04–7441. LANZILOTTA-DICKS *v.* THOMAS MORE COLLEGE. C. A. 6th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 149.

No. 04–7448. WORKMAN *v.* SUMMERS, ATTORNEY GENERAL OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 369.

No. 04–7688. RICHMOND *v.* POLK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 375 F. 3d 309.

No. 04–7757. WAGATHA *v.* SATELLITE BEACH POLICE DEPARTMENT. Sup. Ct. Fla. Certiorari denied. Reported below: 880 So. 2d 1213.

No. 04–7814. ROBINSON *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7822. MARTINEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–7831. MARSHALL *v.* LAW OFFICES OF RICHARD TANZER, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–7835. BISHOP *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 882 So. 2d 135.

No. 04–7852. J. W., A MINOR *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 346 Ill. App. 3d 1, 804 N. E. 2d 1094.

No. 04–7853. ZIMMERMAN *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. Ct. App. Colo. Certiorari denied.

No. 04–7857. SLOAN *v.* GRAHAM ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 10 App. Div. 3d 433, 780 N. Y. S. 2d 739.

No. 04–7858. SLOAN *v.* KNAPP ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 10 App. Div. 3d 434, 780 N. Y. S. 2d 738.

No. 04–7859. SINQUEFIELD *v.* MOSELY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–7862. MULLEN *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–7864. LEE *v.* MILLER, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–7865. MARTIN *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7867. SOKOLSKY *v.* LOS ANGELES COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–7873. KANG *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–7878. OMUNA *v.* FISHER ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7883. DUBOSE *v.* KELLY ET AL. C. A. 8th Cir. Certiorari denied.

No. 04–7891. ADI *v.* PRUDENTIAL PROPERTY & CASUALTY INSURANCE CO. ET AL. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 04–7897. PRUITT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 04–7900. CLARK *v.* GONZALES, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied.

No. 04–7925. CARTER *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 385 F. 3d 1194.

No. 04–7930. LANCASTER *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 878 So. 2d 140.

No. 04–7936. OMUNA *v.* GARCIA, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 887.

No. 04–7952. LUCZAK *v.* MOTE, WARDEN. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 04–7980. HAMPTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 945.

No. 04–8002. VALLE *v.* GEORGIA DEPARTMENT OF CORRECTIONS. Ct. App. Ga. Certiorari denied.

No. 04–8019. CATALANO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–8027. STEVENSON *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 384 F. 3d 1069.

No. 04–8057. ADAMS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–8132. WATTS *v.* FLORIDA COMMISSION ON HUMAN RELATIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 888 So. 2d 20.

No. 04–8151. WILKINSON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–8180. WOODBERRY *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–8229. LIEDTKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 416.

No. 04–8241. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 317.

No. 04–8249. SORRELLS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–8291. BELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 300.

No. 04–8300. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–8313. ELIZONDO-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 324.

No. 04–8327. GRIFFIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 389 F. 3d 1100.

No. 04–8333. MCLEAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 183.

No. 04–8336. TODD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 118.

No. 04–8337. WASHINGTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 986.

No. 04–8347. VEGA-COSME ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–8351. RUTHERFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8354. HARTLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 786.

No. 04–8366. REID *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 482.

No. 04–8375. VENTRICE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 885.

No. 04–8383. LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 336.

No. 04–8387. CLAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 376 F. 3d 1296.

No. 04–8388. STEWART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 228.

No. 04–8393. ORIAKHI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 113 Fed. Appx. 460.

No. 04–8398. TAYLOR *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 04–8400. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 168.

No. 04–8403. BRITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 352.

No. 04–8421. GUERRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 294.

No. 04–8427. ESTRADA-SOTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 223.

No. 04–8428. DADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–8434. BURSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 837.

No. 04–704. TRAWINSKI *v.* UNITED TECHNOLOGIES CARRIER CORP. ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 112 Fed. Appx. 3.

Rehearing Denied

No. 03–10875. MENDOZA *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 855;

No. 04–5708. CEDANO-MEDINA *v.* UNITED STATES, *ante*, p. 1035;

No. 04–6345. JACKSON *v.* CAMBRA, WARDEN, ET AL., *ante*, p. 1005;

No. 04–6557. PRUITT *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 1023;

No. 04–6708. BANSAL *v.* LAMAR UNIVERSITY ET AL., *ante*, p. 1027;

No. 04–6818. RICHBURG *v.* UNITED STATES, *ante*, p. 994;

No. 04–7003. IN RE VOVAK, *ante*, p. 1048;

No. 04–7127. PESCI *v.* GANSHEIMER, WARDEN, *ante*, p. 1068;

No. 04–7287. ROHN *v.* UNITED STATES, *ante*, p. 1072;

No. 04–7300. IN RE VOVAK, *ante*, p. 1049;

No. 04–7318. CASTRO-BALDERAS, AKA MEDINA-TELFINO, AKA LUNA *v.* UNITED STATES; ARVIZO-ENRIQUEZ *v.* UNITED STATES;

CHAVEZ-MARTINEZ *v.* UNITED STATES; MORENO-AMAYA, AKA GARCIA, AKA MORENO, AKA GUADALUPE MORENO *v.* UNITED STATES; RODRIGUEZ-LOPEZ *v.* UNITED STATES; and SOTO-VAQUERA, AKA SOTO, AKA VAGUERRA SOTO, AKA SOTO VAGUERRA *v.* UNITED STATES, *ante*, p. 1073;

No. 04–7323. CISNEROS-MUNIZ *v.* UNITED STATES; and NAVARETTE-MORALES, AKA VALERANO-VASQUEZ *v.* UNITED STATES, *ante*, p. 1073;

No. 04–7324. AGUILAR-GARCIA *v.* UNITED STATES; BRACERO-LEMUS *v.* UNITED STATES; CENTENO-SANCHEZ *v.* UNITED STATES; ESPARZA-ROBLES *v.* UNITED STATES; GONZALEZ-VALLEJO *v.* UNITED STATES; MENDIETA-GOMEZ *v.* UNITED STATES; NAVA-ALVAREZ *v.* UNITED STATES; DELGADO-PEREZ *v.* UNITED STATES; TORRES-PESINA *v.* UNITED STATES; RODRIGUEZ-PUENTE *v.* UNITED STATES; SANTOS-SALINAS *v.* UNITED STATES; and CARREON-SUAREZ *v.* UNITED STATES, *ante*, p. 1073;

No. 04–7424. TOWNSEND *v.* UNITED STATES, *ante*, p. 1076;

No. 04–7436. MCKENZIE *v.* UNITED STATES, *ante*, p. 1077;

No. 04–7479. SPRY *v.* UNITED STATES, *ante*, p. 1077; and

No. 04–7535. GREEN *v.* UNITED STATES, *ante*, p. 1079. Petitions for rehearing denied.

No. 03–10956. ECKARDT *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 860. Motion for leave to file petition for rehearing denied.

MARCH 1, 2005

Certiorari Denied

No. 04–8900 (04A746). MOBLEY *v.* NIX, CHAIRMAN, GEORGIA BOARD OF PARDONS AND PAROLES, ET AL. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

No. 04–8901 (04A747). MOBLEY *v.* SCHOFIELD, WARDEN (two judgments). Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1194 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

SPENCER ET AL. *v.* PUGH ET AL.

ON APPLICATION TO VACATE STAY

No. 04A360. Decided November 2, 2004*

Applicants' request to vacate the Sixth Circuit's emergency stays of two District Court orders requiring Ohio Republican challengers to stay out of predominantly African-American neighborhood polling places or stay only as observers on election day 2004 is denied. While their allegations of abuse—notably, voter intimidation—are serious, it is impossible to determine the ultimate validity of their claims on the current record. Practical considerations, such as the difficulty of properly reviewing the parties' submissions as a full Court in a limited timeframe, weigh against granting such extraordinary relief. Moreover, it is hoped that the elected officials and election volunteers on the ground will carry out their responsibilities in a way that will enable qualified voters to cast their ballots.

JUSTICE STEVENS, Circuit Justice.

In two suits brought in the Federal District Courts of Ohio, plaintiffs allege that Ohio Republicans plan to send hundreds of challengers into predominantly African-American neighborhoods to mount indiscriminate challenges at polling places, which they claim will cause voter intimidation and inordinate delays in voting.

After taking evidence, the District Courts granted partial relief, reasoning that the severe burden that these challengers would place on the rights of voters was not justified by the State's interest in preventing fraud. The courts, however, refused to enjoin the challenge process completely;

*Together with No. 04A364, *Summit County Democratic Central and Executive Committee et al.* v. *Heider et al.*, also on application to vacate stay.

instead, and consistently with a memorandum issued by the secretary of state, one court ordered the challengers to stay out of polling places while the other court ordered them to remain in polling places only as witnesses.

While the secretary of state—the official charged with administering the State's election code—did not appeal the District Courts' orders, various Republican voters, who intervened in the District Court proceedings, sought relief from the Court of Appeals for the Sixth Circuit. Over a dissent, the Court of Appeals granted their motions for an emergency stay. *Summit Cty. Democratic Central and Executive Comm.* v. *Blackwell*, 388 F. 3d 547 (2004). With just several hours left before the first voters will make their way to the polls, the plaintiffs have applied to me in my capacity as Circuit Justice to enter an order reinstating the District Courts' injunctions. While I have the power to grant the relief requested, I decline to do so for prudential reasons. Cf. *Socialist Labor Party* v. *Rhodes*, 89 S. Ct. 3, 21 L. Ed. 2d 72 (1968) (Stewart, J., in chambers).

Although the hour is late and time is short, I have reviewed the District Court opinions and the opinions of the Circuit Judges. That reasonable judges can disagree about the issues is clear enough.

The allegations of abuse made by the plaintiffs are undoubtedly serious—the threat of voter intimidation is not new to our electoral system—but on the record before me it is impossible to determine with any certainty the ultimate validity of the plaintiffs' claims.

Practical considerations, such as the difficulty of digesting all of the relevant filings and cases, and the challenge of properly reviewing all of the parties' submissions as a full Court in the limited timeframe available, weigh heavily against granting the extraordinary type of relief requested here. Moreover, I have faith that the elected officials and numerous election volunteers on the ground will carry out

their responsibilities in a way that will enable qualified voters to cast their ballots.

Because of the importance of providing the parties with a prompt decision, I am simply denying the applications to vacate stays without referring them to the full Court.

It is so ordered.

Opinion in Chambers

DEMOCRATIC NATIONAL COMMITTEE ET AL. *v.* REPUBLICAN NATIONAL COMMITTEE ET AL. MALONE, INTERVENOR

ON APPLICATION TO VACATE STAY

No. 04A378. Decided November 2, 2004

Ohio voter's application to stay a Third Circuit order, which had stayed a District Court's injunction in this case, is denied. Applicant claims that her right to vote and that of other Ohio minority voters would be jeopardized by anticipated challenges to their votes from Republicans. However, since making her application, she has filed a further pleading disclosing that she has voted without challenge.

JUSTICE SOUTER, Circuit Justice.

The individual Ohio voter who intervened in this case claimed that the Republican National Committee threatened to violate a consent decree, by challenging Ohio voters named on a list of 35,000 individual names compiled by Republican officials in Ohio in cooperation with the Republican National Committee. She alleged that her right to vote and that of other minority voters would be jeopardized by the anticipated challenges from the Republican side. Yesterday, the District Court found such a threatened violation and issued the injunction requested, a stay of which was denied by a divided panel of the Court of Appeals for the Third Circuit late last night. Following the action that was subject to JUSTICE STEVENS's opinion in chambers earlier today in *Spencer* v. *Pugh*, *ante*, p. 1301, the Republican National Committee moved for rehearing or rehearing en banc, the latter of which was granted this afternoon by order staying the injunction. No. 04–4186, 2004 U. S. App. LEXIS 22689 (CA3, Nov. 2, 2004). The intervenor alone has now applied to me in my capacity as Circuit Justice for the Third Circuit for a stay of the en banc order itself, which would effectively reinstate the injunction. Since making the application, she has filed a further pleading disclosing that she has already

voted without challenge. Under the circumstances, I have decided against referring the application to the full Court and now deny it.

It is so ordered.

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CONSTITUTIONAL LAW.

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Federal Sentencing Guidelines—Validity of mandatory sentences.—Sixth Amendment, as construed in *Blakely* v. *Washington*, 542 U. S. 296, applies to Federal Sentencing Guidelines; Sentencing Reform Act of 1984 provision making those Guidelines mandatory, 18 U. S. C. § 3553(b)(1), must be severed and excised from Act, as must § 3742(e), which depends upon Guidelines' mandatory nature. United States v. Booker, p. 220.

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VII. Searches and Seizures.

1. *Narcotics-detection dog—Lawful traffic stop.*—A sniff by a narcotics-detection dog during a concededly lawful traffic stop does not violate Fourth Amendment where sniff reveals no information other than location of a substance that no individual has any right to possess. Illinois v. Caballes, p. 405.

2. *Warrantless arrest—Probable cause.*—A warrantless arrest is reasonable under Fourth Amendment if, given facts known to arresting officer, there is probable cause to believe that a crime has been or is being committed; it is not made unlawful by fact that offense establishing probable cause is not "closely related" to offense stated by officer at time of arrest. Devenpeck v. Alford, p. 146.

CONTINGENT FEE PAYMENTS AS INCOME. See **Taxes.**

CONTRACT SUPPORT COSTS. See **Indian Self-Determination and Education Assistance Act.**

CRIMINAL LAW. See also **Constitutional Law,** I; II; V–VII; **Habeas Corpus; Immigration and Nationality Act,** 1; **Supreme Court.**

Money laundering—Conspiracy—Proof required.—Conviction for conspiracy to commit money laundering under 18 U. S. C. § 1956(h) does not require proof of an overt act in furtherance of conspiracy. Whitfield v. United States, p. 209.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** I; **Habeas Corpus.**

DEATH PENALTY. See **Constitutional Law,** I; **Habeas Corpus.**

DEPORTATION. See **Immigration and Nationality Act.**

DISCRIMINATION BASED ON RACE. See **Constitutional Law,** III; **Injunctions.**

DISCRIMINATION IN VOTING. See **Injunctions.**

DOUBLE JEOPARDY. See **Constitutional Law,** II.

DREDGES. See **Longshore and Harbor Workers' Compensation Act.**

DRIVING UNDER INFLUENCE. See **Immigration and Nationality Act,** 1.

DRUG-DETECTION DOGS. See **Constitutional Law,** VII, 1.

EFFECTIVE ASSISTANCE OF COUNSEL. See **Constitutional Law,** V.

EIGHTH AMENDMENT. See **Constitutional Law,** I; **Habeas Corpus; Supreme Court.**

ELECTIONS. See **Injunctions.**

EMPLOYER AND EMPLOYEES. See **Constitutional Law,** IV.

ENVIRONMENTAL LAW.

Comprehensive Environmental Response, Compensation, and Liability Act of 1980—Hazardous waste site cleanup—Contributions from other liable parties.—A private party undertaking the cleanup of properties contaminated by hazardous substances, who has not been sued in a civil action under CERCLA § 106 or § 107(a) may not obtain contribution under § 113(f)(1) of that Act from other liable parties. Cooper Industries, Inc. v. Aviall Services, Inc., p. 157.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** III.

EXECUTION OF JUVENILE OFFENDERS. See **Constitutional Law,** I, 2.

FAIR USE DEFENSE. See **Trademarks.**

FEDERAL SENTENCING GUIDELINES. See **Constitutional Law,** VI.

FEDERAL TAXES. See **Taxes.**

FIFTH AMENDMENT. See **Constitutional Law,** II, IV.

FIRST AMENDMENT. See **Constitutional Law,** IV.

FLORIDA. See **Immigration and Nationality Act,** 1.

FOURTEENTH AMENDMENT. See **Constitutional Law,** I, 2; III; **Supreme Court.**

FOURTH AMENDMENT. See **Constitutional Law,** VII; **Immunity from Suit.**

FREEDOM OF SPEECH. See **Constitutional Law,** IV.

FUTURE DANGEROUSNESS. See **Constitutional Law,** I, 1.

GROSS INCOME. See **Taxes.**

GUILTY PLEAS. See **Constitutional Law,** V.

HABEAS CORPUS. See also **Immigration and Nationality Act,** 3.

Capital murder—Sentencing—Vague jury instruction.—Granting respondent federal habeas relief was in error because, in finding that statutory aggravating circumstance found by jury was unconstitutionally vague and that Tennessee Supreme Court failed to cure this vagueness on direct

HABEAS CORPUS—Continued.
appeal, Sixth Circuit failed to accord state court deference required by 28 U. S. C. § 2254(d). Bell v. Cone, p. 447.

HAZARDOUS WASTE CLEANUP. See **Environmental Law.**

IMMIGRATION AND NATIONALITY ACT.

1. *Deportation—Aggravated felonies—Driving-under-influence offenses.*—State driving-under-influence offenses, such as Florida's, which either do not have a *mens rea* component or require only a showing of negligence in operation of a vehicle, are not crimes of violence under 18 U. S. C. § 16 and therefore are not aggravated felonies that can subject aliens to deportation under INA. Leocal v. Ashcroft, p. 1.

2. *Removal of aliens—Designated country's consent.*—Title 8 U. S. C. § 1231(b)(2)(E)(iv) permits an alien to be removed to a country without advance consent of that country's government. Jama v. Immigration and Customs Enforcement, p. 335.

3. *Removal of aliens—Detention beyond removal period—Habeas corpus.*—Under 8 U. S. C. § 1231(a)(6), Secretary of Homeland Security may detain inadmissible aliens beyond a statutory 90-day removal period, but only so long as is reasonably necessary to achieve removal; because both aliens here were detained well beyond presumptive time allotted to remove them and their removal to Cuba is not reasonably foreseeable, their habeas petitions should have been granted. Clark v. Martinez, p. 371.

IMMUNITY FROM SUIT.

Qualified immunity—Police officer's conduct.—Ninth Circuit erred in denying Officer Brosseau qualified immunity under *Saucier* v. *Katz*, 533 U. S. 194, in Haugen's 42 U. S. C. § 1983 civil action; at time Brosseau shot Haugen while he was fleeing police in his vehicle, pertinent cases did not "clearly establish" that Brosseau's conduct violated Fourth Amendment. Brosseau v. Haugen, p. 194.

INCOME TAXES. See **Taxes.**

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT.

Federal Government's obligation to pay certain "costs."—Federal Government's promises to pay certain "contract support costs," 25 U. S. C. § 450j–1(a)(2), incurred by petitioner Indian Tribes are legally binding even where Congress has not appropriated sufficient funds for payments. Cherokee Nation of Okla. v. Leavitt, p. 631.

INDIGENT DEFENDANTS. See **Standing.**

INEFFECTIVE ASSISTANCE OF COUNSEL. See **Constitutional Law, V.**

INFRINGEMENT OF TRADEMARKS. See **Trademarks.**

INJUNCTIONS.

1. *Voting rights—Polling places—Vote challengers.*—Application by Ohio voter seeking to reinstate a District Court injunction barring Republican vote challengers from Ohio polling places in predominantly minority neighborhoods is denied, as applicant has already voted without challenge. Democratic National Committee v. Republican National Committee (SOUTER, J., in chambers), p. 1304.

2. *Voting rights—Polling places—Vote challengers.*—In suits alleging that Ohio Republicans planned to send challengers into predominantly minority neighborhoods to mount indiscriminate challenges at polling places in order to intimidate voters and cause voting delays, applications requesting reinstatement of District Court injunctions ordering challengers to stay out of polling places or to be there only as witnesses are denied because, on record here, it is impossible to determine with any certainty validity of plaintiffs' claims. Spencer v. Pugh (STEVENS, J., in chambers), p. 1301.

INTERCONTINENTAL SHIPPING. See **Maritime Law.**

JURY INSTRUCTIONS. See **Constitutional Law,** I, 1; **Habeas Corpus; Supreme Court.**

JURY TRIALS. See **Constitutional Law,** VI.

JUVENILE OFFENDERS AND DEATH PENALTY. See **Constitutional Law,** I, 2.

KANSAS. See **Riparian Rights.**

LESSER-INCLUDED OFFENSES. See **Supreme Court.**

LIABILITY LIMITATIONS. See **Maritime Law.**

LOANS. See **Truth in Lending Act.**

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

"Vessel"—Dredge.—A dredge, such as that used by respondent to dig a trench beneath Boston Harbor, is a "vessel" under LHWCA. Stewart v. Dutra Constr. Co., p. 481.

MARITIME LAW.

Bills of lading—Intercontinental delivery—Final delivery to inland United States.—Federal maritime law governs interpretation of two bills of lading arranging intercontinental delivery of goods to inland United States; petitioner railroad is entitled to be protected by those bills' liability limitations in an action for damages caused by a train wreck on last, inland

MARITIME LAW—Continued.
leg of goods' journey. Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd., p. 14.

MASSACHUSETTS. See **Constitutional Law,** II.

MICHIGAN. See **Standing.**

MIDTRIAL ACQUITTAL. See **Constitutional Law,** II.

MISSISSIPPI. See **Supreme Court.**

MITIGATION EVIDENCE. See **Constitutional Law,** I, 1.

MONEY LAUNDERING. See **Criminal Law.**

MURDER. See **Constitutional Law,** I; V; **Habeas Corpus; Supreme Court.**

NARCOTICS-DETECTION DOGS. See **Constitutional Law,** VII, 1.

OHIO. See **Injunctions.**

PERSONAL-PROPERTY LOANS. See **Truth in Lending Act.**

POLICE CONDUCT. See **Constitutional Law,** IV; VII, 2; **Immunity from Suit.**

PRISONERS' RIGHTS. See **Constitutional Law,** III.

PROBABLE CAUSE. See **Constitutional Law,** VII, 2.

PUBLIC EMPLOYER AND EMPLOYEES. See **Constitutional Law,** IV.

QUALIFIED IMMUNITY. See **Immunity from Suit.**

RACIAL DISCRIMINATION. See **Injunctions.**

RACIAL SEGREGATION. See **Constitutional Law,** III.

RAILROADS. See **Maritime Law.**

REAL-PROPERTY-SECURED LOANS. See **Truth in Lending Act.**

REMOVAL OF ALIENS. See **Immigration and Nationality Act.**

RIGHT TO COUNSEL. See **Constitutional Law,** V.

RIGHT TO JURY TRIAL. See **Constitutional Law,** VI.

RIGHT TO VOTE. See **Injunctions.**

RIPARIAN RIGHTS.

Arkansas River—Water distribution.—Kansas' exceptions to Special Master's Fourth Report in this case involving distribution of Arkansas River waters are overruled, Master's recommendations are accepted, and case is recommitted to Master for preparation of a decree. Kansas v. Colorado, p. 86.

SEARCHES AND SEIZURES. See **Constitutional Law,** VII; **Immunity from Suit.**

SEGREGATION BY RACE. See **Constitutional Law,** III.

SENTENCING GUIDELINES. See **Constitutional Law,** VI.

SENTENCING REFORM ACT OF 1984. See **Constitutional Law,** VI.

SIXTH AMENDMENT. See **Constitutional Law,** V; VI.

STANDING.

Third-party standing—Attorneys asserting indigent defendants' rights.—Respondent attorneys lack third-party standing to assert rights of indigent defendants to challenge Michigan's procedure denying appointed appellate counsel to indigents pleading guilty or nolo contendere. Kowalski v. Tesmer, p. 125.

STRICT SCRUTINY STANDARD OF REVIEW. See **Constitutional Law,** III.

SUPREME COURT.

1. Presentation of Acting Solicitor General, p. v.

2. *Certiorari—Dismissal—Failure to raise claim in state court.*—Certiorari is dismissed as improvidently granted because petitioner did not raise his claim in Mississippi Supreme Court that state courts violated his Eighth and Fourteenth Amendment rights by refusing to require a jury instruction about a lesser-included offense in his capital case. Howell v. Mississippi, p. 440.

TAXES.

Federal income taxes—Gross income—Contingent fee payments.—When a litigant's recovery constitutes income, his gross income for federal income tax purposes includes portion of recovery paid to his attorney as a contingent fee. Commissioner v. Banks, p. 426.

TENNESSEE. See **Habeas Corpus.**

THIRD-PARTY STANDING. See **Standing.**

TORT RECOVERY. See **Taxes.**

TRADEMARKS.

Infringement—Fair use affirmative defense.—A party raising statutory affirmative defense of fair use to a claim of trademark infringement does not have a burden to negate any likelihood that practice complained of will confuse consumers about origin of goods or services affected. KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., p. 111.

TRAFFIC STOPS. See **Constitutional Law,** VII, 1.

TRIAL BY JURY. See **Constitutional Law,** VI.

TRUTH IN LENDING ACT.

Civil liability—Personal-property loans—Minimum and maximum recoveries.—Amendment to TILA's civil-liability provision raised statutory damages recoverable for violations involving real-property-secured loans, but left unaltered $100/$1,000 minimum and maximum recoveries previously prescribed for violations involving personal-property loans. Koons Buick Pontiac GMC, Inc. v. Nigh, p. 50.

VESSEL. See **Longshore and Harbor Workers' Compensation Act.**

VOTING RIGHTS. See **Injunctions.**

WARRANTLESS ARREST. See **Constitutional Law,** VII, 2.

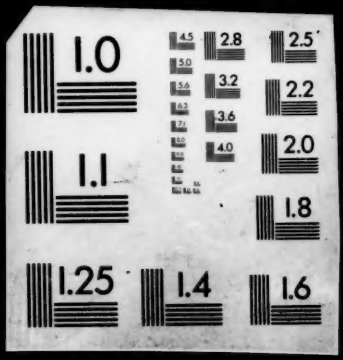
WATER RIGHTS. See **Riparian Rights.**

WORDS AND PHRASES.

1. *"Contract support costs."* Indian Self-Determination and Education Assistance Act, 25 U. S. C. § 450j–1(a)(2). Cherokee Nation of Okla. v. Leavitt, p. 631.

2. *"Vessel."* § 5(b), Longshore and Harbor Workers Compensation Act, 33 U. S. C. § 905(b). Stewart v. Dutra Constr. Co., p. 481.

WORKERS' COMPENSATION. See **Longshore and Harbor Workers' Compensation Act.**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